THE JOURNAL OF
LIBERTARIAN STUDIES
AN INTERDISCIPLINARY QUARTERLY REVIEW

SYMPOSIUM: APPLICATIONS OF LIBERTARIAN LEGAL THEORY

N. Stephan Kinsella
Against Intellectual Property

Walter Block
Toward a Libertarian Theory of Blackmail

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The Rise and Fall of Jury Nullification

Volume 15, Number 2, Spring 2001

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AGAINST INTELLECTUAL PROPERTY

N. Stephan Kinsella*

PROPERTY RIGHTS: TANGIBLE AND INTANGIBLE

All libertarians favor property rights, and agree that property rights include rights in tangible resources. These resources include immovables (realty) such as land and houses, and movables such as chairs, clubs, cars, and clocks.[1]

Further, all libertarians support rights in one's own body. Such rights may be called "self-ownership" as long as one keeps in mind that there is dispute about whether such body-ownership is alienable in the same way that rights in homesteadable, external objects are

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The author thanks Wendy McElroy and Gene Callahan for helpful comments on an earlier draft. The views expressed herein are those of the author alone, and should not be attributed to any other person or entity. An earlier version of this article was presented at the Austrian Scholars Conference, Auburn, Alabama, March 25, 2000. A condensed version of some of the arguments in this article may be found in N. Stephan Kinsella, "In Defense of Napster and Against the Second Homesteading Rule," http://www.lewrockwell.com/orig/kinsella2.html, September 4, 2000. Contact the author at kinsella@swbell.net.

[1]Terms like "realty," "personalty," and "tangible" are common-law terms; analogous civil-law terms are "immovables," "movables," and "corporeals," respectively. See N. Stephan Kinsella, "A Civil Law to Common Law Dictionary," *Louisiana Law Review* 54 (1994), pp. 1265–305 for further differences between civil-law and common-law terminology. The term "things" is a broad civil-law concept that refers to all types of items, whether corporeal or incorporeal, movable or immovable.

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alienable.[2] In any event, libertarians universally hold that all tangible scarce resources—whether homesteadable or created, immovable or movable, or our very bodies—are subject to rightful control, or "ownership," by specified individuals.

As we move away from the tangible (corporeal) toward the intangible, matters become fuzzier. Rights to reputations (defamation laws) and against blackmail, for example, are rights in very intangible types of things. Most, though not all, libertarians oppose laws against blackmail, and many oppose the idea of a right to one's reputation.[3]

Also disputed is the concept of intellectual property (herein referred to as IP). Are there individual rights to one's intellectual creations, such as inventions or written works? Should the legal system

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[2]Debate over this issue manifests itself in differences over the issue of inalienability and with respect to the law of contract, i.e., can we "sell" or alienate our bodies in the same manner that we can alienate title to homesteaded property? For arguments against body inalienability, see N. Stephan Kinsella, "A Theory of Contracts: Binding Promises, Title Transfer, and Inalienability" (paper presented at the Austrian Scholars Conference, Auburn, Alabama, April 1999); and N. Stephan Kinsella, "Inalienability and Punishment: A Reply to George Smith," *Journal of Libertarian Studies* 14, no. 1 (Winter 1998–99), pp. 79–93. For arguments favoring such alienability, see Walter Block, "Toward a Libertarian Theory of Inalienability: A Critique of Rothbard, Barnett, Gordon, Smith, Kinsella, and Epstein," *Journal of Libertarian Studies* (forthcoming).

[3]For views in opposition to blackmail laws, see Walter Block, "Toward a Libertarian Theory of Blackmail," *Journal of Libertarian Studies* 15, no. 2 (Spring 2001); Walter Block, "A Libertarian Theory of Blackmail," *Irish Jurist* 33 (1998), pp. 280–310; Walter Block, *Defending the Undefendable* (New York: Fleet Press, 1976), pp. 53–54; Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1998), pp. 124–26; and Eric Mack, "In Defense of Blackmail," *Philosophical Studies* 41 (1982), p. 274.

For libertarian views in favor of blackmail laws, see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 85–86; and Richard Epstein, "Blackmail, Inc.," *University of Chicago Law Review* 50 (1983), p. 553.

For libertarian arguments against defamation (libel and slander) laws, see Block, *Defending the Undefendable*, pp. 50–53; and Rothbard, *The Ethics of Liberty*, pp. 126–28; in favor, see David Kelley in *David Kelley vs. Nat Hentoff: Libel Laws: Pro and Con*, audiotape (Free Press Association, Liberty Audio, 1987).

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protect such rights? Below, I summarize current U.S. law on intellectual property rights. I then survey various libertarian views on IP rights, and present what I consider to be the proper view.

SUMMARY OF IP LAW

Types of IP

Intellectual property is a broad concept that covers several types of legally recognized rights arising from some type of intellectual creativity, or that are otherwise related to ideas.[4] IP rights are rights to intangible things[5]—to *ideas*, as expressed (copyrights), or as embodied in a practical implementation (patents). Tom Palmer puts it this way: "Intellectual property rights are rights in ideal objects, which are distinguished from the material substrata in which they are instantiated."[6] In today's legal systems, IP typically includes at least copyrights, trademarks, patents, and trade secrets.[7]

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[4]In some European countries, the term "industrial property" is used instead of "intellectual property."

[5]*De La Vergne Refrigerating Mach. Co. v Featherstone*, 147 U.S. 209, 222, 13 S.Ct. 283, 285 (1893).

[6]Tom G. Palmer, "Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects," in "Symposium: Intellectual Property," *Harvard Journal of Law & Public Policy* 13, no. 3 (Summer 1990), p. 818. As one commentator has noted, "intellectual property may be defined as embracing rights to novel ideas as contained in tangible products of cognitive effort." Dale A. Nance, "Foreword: Owning Ideas," in "Symposium: Intellectual Property," *Harvard Journal of Law & Public Policy* 13, no. 3 (Summer 1990), p. 757.

[7]A useful introduction to IP can be found in Arthur R. Miller and Michael H. Davis, *Intellectual Property: Patents, Trademarks, and Copyrights in a Nutshell*, 2nd ed. (St. Paul, Minn.: West Publishing, 1990); see also "Patent, Trademark, and Trade Secret," http://profs.lp.findlaw.com/patents/index.html. For a good introduction to patent law, see Ronald B. Hildreth, *Patent Law: A Practitioner's Guide,* 3rd ed. (New York: Practising Law Institute, 1998). More in-depth treatises with further information on IP law include Donald S. Chisum, *Chisum on Patents* (New York: Matthew Bender, 2000); Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* (New York: Matthew Bender, 2000); Paul Goldstein, *Copyright: Principles, Law, and Practice* (Boston: Little, Brown, 1989); J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, 4th ed. (St. Paul, Minn.: West Group, 1996); and Roger M. Milgrim, *Milgrim on Trade Secrets* (New York: Matthew Bender, 2000). Useful information,

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Copyright

Copyright is a right given to authors of "original works," such as books, articles, movies, and computer programs. Copyright gives the exclusive right to reproduce the work, prepare derivative works, or to perform or present the work publicly.[8] Copyrights protect only the *form* or *expression* of ideas, not the underlying ideas themselves.[9]

While a copyright may be registered to obtain legal advantages, a copyright need not be registered to exist. Rather, a copyright comes into existence automatically the moment the work is "fixed" in a "tangible medium of expression," and lasts for the life of the author plus seventy years, or for a total of ninety-five years in cases in which the employer owns the copyright.[10]

Patent

A patent is a property right in inventions, that is, in devices or processes that perform a "useful" function.[11] A new or improved mousetrap is an example of a type of device which may be patented. A patent effectively grants the inventor a limited monopoly on the manufacture, use, or sale of the invention. However, a patent actually only grants to the patentee the right to *exclude* (i.e., to prevent others from practicing the patented invention); it does not actually grant to the patentee the right to *use* the patented invention.[12]

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brochures, and pamphlets are available from the United States Copyright Office, http://lcweb.loc.gov/copyright, and from the Patent and Trademark Office of the Department of Commerce, http://www.uspto.gov. Other useful sites are listed in this article's appendix and bibliography.

[8]17 USC §§ 101, 106 *et pass*.

[9]Modern copyright law has superseded and largely preempted "common law copyright," which attached automatically from the moment of a work's creation, and which essentially conferred only a right of *first* publication. Goldstein, *Copyright*, §§ 15.4 *et seq*.

[10]17 USC § 302. Due to recent legislation, these terms are 20 years longer than under previous law. See HR 2589, the *Sonny Bono Copyright Term Extension Act/Fairness in Music Licensing Act of 1998*.

[11]35 USC § 1 *et seq*.; 37 CFR Part 1.

[12]Suppose *A* invents and patents a better mousetrap, which has a Nitinol (memory metal) spring for better snapping ability. Now suppose *B* invents and patents a mousetrap with a Nitinol spring covered with non-stick coating, to improve the ability to remove mouse remains while still providing

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Not every innovation or discovery is patentable. The U.S. Supreme Court has, for example, identified three categories of subject matter that are unpatentable, namely "laws of nature, natural phenomena, and abstract ideas."[13] Reducing abstract ideas to some type of "practical application," i.e., "a useful, concrete and tangible result,"[14] is patentable, however. U.S. patents, since June 8, 1995, last from the date of issuance until twenty years from the original filing date of the patent application[15] (the previous term was seventeen years from date of issue).

Trade Secret

A trade secret consists of any confidential formula, device, or piece of information which gives its holder a competitive advantage so long as it remains secret.[16] An example would be the formula for Coca-Cola®. Trade secrets can include information that is not novel enough to be subject to patent protection, or not original enough to be protected by copyright (e.g., a database of seismic data or customer lists). Trade secret laws are used to prevent "misappropriations" of the trade secret, or to award damages for such misappropriations.[17] Trade secrets are protected under state law, although recent federal law has been enacted to prevent theft of trade secrets.[18]

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the Nitinol-driven snapping action. *B* has to have a mousetrap with a Nitinol spring in order to use his invention, but this would infringe upon *A*'s patent. Similarly, *A* cannot add the non-stick coating to his own invention without infringing upon *B*'s improvement patent. In such situations, the two patentees may cross-license, so that *A* can practice *B*'s improvement to the mousetrap, and so *B* can use his own invention.

[13] *Diamond v Diehr*, 450 US 175, 185 (1981); see also 35 USC § 101.

[14] *In re Alappat*, 33 F3d 1526, 1544, 31 USPQ2d 1545, 1557 (Fed Cir 1994) (in banc). See also *State Street Bank & Trust Co. v Signature Financial Group*, 149 F3d 1368 (Fed Cir 1998).

[15] 35 USC § 154(a)(2).

[16] See, e.g., R. Mark Halligan, esq., "Restatement of the Third Law—Unfair Competition: A Brief Summary," §§ 39–45, http://execpc.com/~mhallign/unfair.html; also see the *Uniform Trade Secrets Act* (UTSA), http://nsi.org/Library/Espionage/usta.htm.

[17] See the *Uniform Trade Secrets Act* (UTSA).

[18] *Economic Espionage Act of 1996*, 18 USC §§ 1831–39.

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Trade secret protection is obtained by declaring that the details of a subject are secret. The trade secret theoretically may last indefinitely, although disclosure, reverse-engineering, or independent invention may destroy it. Trade secrets can protect secret information and processes, e.g., compilations of data and maps not protectable by copyright, and can also be used to protect software source code not disclosed and not otherwise protectable by patent. One disadvantage of relying on trade secret protection is that a competitor who independently invents the subject of another's trade secret can obtain a patent on the device or process and actually prevent the original inventor (the trade secret holder) from using the invention.

Trademark

A trademark is a word, phrase, symbol, or design used to *identify* the source of goods or services sold, and to distinguish them from the goods or services of others. For example, the Coca-Cola® mark and the design that appears on their soft drink cans identifies them as products of that company, distinguishing them from competitors such as Pepsi®. Trademark law primarily prevents competitors from "infringing" upon the trademark, i.e., using "confusingly similar" marks to identify their own goods and services. Unlike copyrights and patents, trademark rights can last indefinitely if the owner continues to use the mark. The term of a federal trademark registration lasts ten years, with ten-year renewal terms being available.[19]

Other rights related to trademark protection include rights against trademark dilution,[20] certain forms of cybersquatting,[21] and various "unfair competition" claims. IP also includes recent legal innovations, such as the mask work protection available for semiconductor integrated circuit (IC) designs,[22] the *sui generis* protection, similar to copyright, for boat hull designs,[23] and the proposed *sui generis* right in databases, or collections of information.[24]

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[19]15 USC § 1501 *et seq.*; 37 CFR Part 2.

[20]15 USC §§ 1125(c), 1127.

[21]15 USC § 1125(d); *Anticybersquatting Consumer Protection Act*, PL 106–113 (1999); HR 3194, S1948.

[22]See 17 USC § 901 *et seq.*

[23]See 17 USC § 1301 *et seq.*

[24]See, e.g., HR 354 (introduced 1/19/1999), *Collections of Information Antipiracy Act.* See also Jane C. Ginsburg, "Copyright, Common Law, and

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In the United States, federal law almost exclusively governs copyrights and patents, since the Constitution grants Congress the power "to promote the progress of science and useful arts."[25] Despite the federal source of patents and copyrights, various related aspects, such as *ownership* of patents, are based on state law, which nevertheless tend to be fairly uniform from state to state.[26] Federal trademarks, by contrast, not being explicitly authorized in the Constitution, are based on the interstate commerce clause and thus only covers marks for goods and services in interstate commerce.[27] State trademarks still exist since they have not been completely preempted by federal law, but federal marks tend to be more commercially important and powerful. Trade secrets are generally protected under state, not federal, law.[28]

Many laymen, including libertarians, have a poor understanding of IP concepts and law, and often confuse copyrights, trademarks, and patents. It is widely, and incorrectly, believed that in the U.S. system, the inventor who files first at the patent office has priority over those who file later. However, the U.S. system is actually a "first-to-invent" system, unlike most other countries, which do have a "first-to-file" system for priority.[29]

Sui Generis Protection of Databases in the United States and Abroad," *University of Cincinnati Law Review* 66 (1997), p. 151.

[25]U.S. Cons., Art I, § 8; *Kewanee Oil Co. v. Bicron Corp.*, 415 US 470, 479, 94 S.Ct. 1879, 1885 (1974).

[26]See Paul C. van Slyke and Mark M. Friedman, "Employer's Rights to Inventions and Patents of Its Officers, Directors, and Employees," *AIPLA Quarterly Journal* 18 (1990), p. 127; and *Chisum on Patents*, § 22.03; 17 USC §§ 101, 201.

[27]U.S. Constitution, art. 1, sec. 8, clause 3; *Wickard v Filburn*, 317 US 111, 63 S. Ct. 82 (1942).

[28]But see the federal *Economic Espionage Act of 1996*, 18 USC §§ 1831–39.

[29]Ayn Rand mistakenly assumes that the first to file has priority (and then she is at pains to defend such a system). See Ayn Rand, "Patents and Copyrights," in *Capitalism: The Unknown Ideal* (New York: New American Library, 1967), p. 133. She also confusingly attacks the strict antitrust scrutiny given to patent holders. However, since patents are government-granted monopolies, it is not unjust to use an anti-monopoly law to limit the ability of a patent owner to extend this monopoly beyond the bounds intended by the patent statute. The problem with antitrust laws is in their application to normal, peaceful business dealings, not to limit *real*—i.e., government-granted—monopolies. A similar point might be made with regard to Bill

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IP Rights and Relation to Tangible Property

As noted above, IP rights, at least for patents and copyrights, may be considered rights in ideal objects. It is important to point out that ownership of an idea, or ideal object, effectively gives the IP owners a property right in *every* physical embodiment of that work or invention. Consider a copyrighted book. Copyright holder *A* has a right to the underlying ideal object, of which the book is but one example. The copyright system gives *A* the right in the very *pattern* of words in the book; therefore, by implication, *A* has a right to *every* tangible instantiation or embodiment of the book—i.e., a right in every physical version of the book, or, at least, to every book within the jurisdiction of the legal system that recognizes the copyright.

Thus, if *A* writes a novel, he has a copyright in this "work." If he sells a physical copy of the novel to *B*, in book form, then *B* owns only that one physical copy of the novel; *B* does not own the "novel" itself, and is not entitled to make a copy of the novel, even using his own paper and ink. Thus, even if *B* owns the material property of paper and printing press, he cannot use his own property to create another copy of *A*'s book. Only *A* has the *right* to *copy* the book (hence, "copyright").

Likewise, *A*'s ownership of a patent gives him the right to prevent a third party from using or practicing the patented invention, even if the third party only uses his own property. In this way, *A*'s ownership of ideal rights gives him some degree of control—ownership—over the tangible property of innumerable others. Patent and copyright invariably transfer partial ownership of tangible property from its natural owner to innovators, inventors, and artists.

LIBERTARIAN PERSPECTIVES ON IP

The Spectrum

Libertarian views on IP range from complete support of the fullest gamut of IP imaginable, to outright opposition to IP rights. Most of the debate about IP concerns patent and copyright; as discussed

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Gates, whose fortune has largely been built based on the government-granted monopoly inherent in copyright. Moreover, as Bill Gates is no libertarian, and doubtlessly does not oppose the legitimacy of antitrust laws, one can hardly wring one's hands in pity over his having to lie in the very bed he helped make.

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below, trademark and trade secret are less problematic. Therefore, this article focuses primarily on the legitimacy of patent and copyright.

Pro-IP arguments may be divided into natural-rights and utilitarian arguments. Libertarian IP advocates tend to adopt the former justification.[30] For example, natural-rights, or at least not explicitly utilitarian, libertarian proponents of IP include, from more to less extreme, Galambos, Schulman, and Rand.[31] Among precursors to modern libertarians, Spooner and Spencer both advocated IP on moral or natural-rights grounds.[32]

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[30]For conventional theories of intellectual property, see "Bibliography of General Theories of Intellectual Property," *Encyclopedia of Law and Economics*, http://encyclo.findlaw.com/biblio/1600.htm; and Edmund Kitch, "The Nature and Function of the Patent System," *Journal of Law and Economics* 20 (1977), p. 265.

[31]See Andrew J. Galambos, *The Theory of Volition*, vol. 1, ed. Peter N. Sisco (San Diego: Universal Scientific Publications, 1999); J. Neil Schulman, "Informational Property: Logorights," *Journal of Social and Biological Structures* (1990); and Rand, "Patents and Copyrights." Other Objectivists (Randians) who support IP include George Reisman, *Capitalism: A Treatise on Economics* (Ottowa, Ill.: Jameson Books, 1996), pp. 388–89; David Kelley, "Response to Kinsella," *IOS Journal* 5, no. 2 (June 1995), p. 13, in response to N. Stephan Kinsella, "Letter on Intellectual Property Rights," *IOS Journal* 5, no. 2 (June 1995), pp. 12–13; Murray I. Franck, "Ayn Rand, Intellectual Property Rights, and Human Liberty," 2 audio tapes, Institute for Objectivist Studies Lecture; Laissez-Faire Books (1991); Murray I. Franck, "Intellectual Property Rights: Are Intangibles True Property," *IOS Journal* 5, no. 1 (April 1995); and Murray I. Franck, "Intellectual and Personality Property," *IOS Journal* 5, no. 3 (September 1995), p. 7, in response to Kinsella, "Letter on Intellectual Property Rights." It is difficult to find published discussions of Galambos's idea, apparently because his own theories bizarrely restrict the ability of his supporters to disseminate them. See, e.g., Jerome Tuccille, *It Usually Begins with Ayn Rand* (San Francisco: Cobden Press, 1971), pp. 69–71. Scattered references to and discussions of Galambos's theories may be found, however, in David Friedman, "In Defense of Private Orderings: Comments on Julie Cohen's 'Copyright and the Jurisprudence of Self-Help'," *Berkeley Technology Law Journal* 13, no. 3 (Fall 1998), n. 52; and in Stephen Foerster, "The Basics of Economic Government," http://www.economic.net/articles/ar0001.html.

[32]Lysander Spooner, "The Law of Intellectual Property: or An Essay on the Right of Authors and Inventors to a Perpetual Property in Their Ideas," in *The Collected Works of Lysander Spooner*, vol. 3, ed. Charles Shively (1855; reprint, Weston, Mass.: M&S Press, 1971); Herbert Spencer, *The*

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According to the natural-rights view of IP held by some libertarians, creations of the mind are entitled to protection just as tangible property is. Both are the product of one's labor and one's mind. Because one owns one's labor, one has a

> natural law right to the fruit of one's labor. Under this view, just as one has a right to the crops one plants, so one has a right to the ideas one generates and the art one produces.[33]

This theory depends on the notion that one owns one's body and labor, and therefore, its fruits, including intellectual "creations." An individual creates a sonnet, a song, a sculpture, by employing his own labor and body. He is thus entitled to "own" these creations, because they result from other things he "owns."

There are also utilitarian pro-IP arguments. Federal Judge Richard Posner is one prominent utilitarian (although not libertarian) IP advocate.[34] Among libertarians, anarchist David Friedman analyzes and appears to endorse IP on "law-and-economics" grounds,[35] a utilitarian institutional framework. The utilitarian argument presupposes that we should choose laws and policies that maximize

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Principles of Ethics, vol. 2 (1893; reprint, Indianapolis, Ind.: Liberty Press, 1978), part IV, chap. 13, p. 121. See also Wendy McElroy, "Intellectual Property: Copyright and Patent," http://www.zetetics.com/mac/intpro1.htm and http://www. zetetics.com/mac/intpro2.htm; and Palmer, "Are Patents and Copyrights Morally Justified?" pp. 818, 825.

[33]Palmer, "Are Patents and Copyrights Morally Justified?" p. 819.

[34]Richard A. Posner, *Economic Analysis of Law*, 4th ed. (Boston: Little, Brown, 1992), § 3.3, pp. 38–45.

[35]David D. Friedman, "Standards As Intellectual Property: An Economic Approach," *University of Dayton Law Review* 19, no. 3 (Spring 1994), pp. 1109–29; and David D. Friedman, *Law's Order: What Economics Has to Do with Law and Why it Matters* (Princeton, N.J.: Princeton University Press, 2000), chap. 11. Ejan Mackaay also advocates IP on utilitarian grounds, in "Economic Incentives in Markets for Information and Innovation," in "Symposium: Intellectual Property," *Harvard Journal of Law & Public Policy* 13, no. 3, p. 867. Earlier utilitarian advocates of IP include John Stuart Mill and Jeremy Bentham. See Arnold Plant, "The Economic Theory Concerning Patents for Inventions," in *Selected Economic Essays and Addresses* (London: Routledge & Kegan Paul, 1974), p. 44; Roger E. Meiners and Robert J. Staaf, "Patents, Copyrights, and Trademarks: Property or Monopoly?" in "Symposium: Intellectual Property," *Harvard Journal of Law & Public Policy* 13, no. 3, p. 911.

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"wealth" or "utility." With respect to copyright and patent, the idea is that more artistic and inventive "innovation" corresponds with, or leads to, more wealth. Public goods and free-rider effects reduce the amount of such wealth below its optimal level, i.e., lower than the level we would achieve if there were adequate IP laws on the books. Thus, wealth is optimized, or at least increased, by granting copyright and patent monopolies that encourage authors and inventors to innovate and create.[36]

On the other hand, there is a long tradition of opposition to patent and copyright. Modern opponents include Rothbard, McElroy, Palmer, Lepage, Bouckaert, and myself.[37] Benjamin Tucker also

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[36]See Palmer, "Are Patents and Copyrights Morally Justified?" pp. 820–21; Julio H. Cole, "Patents and Copyrights: Do the Benefits Exceed the Costs?" http://www.economia.ufm.edu.gt/Catedraticos/jhcole/Cole%20_MPS_.pdf

[37]See Murray N. Rothbard, *Man, Economy, and State* (Los Angeles: Nash Publishing, 1962), pp. 652–60; Murray N. Rothbard, *The Ethics of Liberty*, pp. 123–24; Wendy McElroy, "Contra Copyright," *The Voluntaryist* (June 1985); McElroy, "Intellectual Property: Copyright and Patent"; Tom G. Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," *Hamline Law Review* 12 (1989), p. 261; Palmer, "Are Patents and Copyrights Morally Justified?"; on Lepage, see Mackaay, "Economic Incentives," p. 869; Boudewijn Bouckaert, "What is Property?" in "Symposium: Intellectual Property," *Harvard Journal of Law & Public Policy* 13, no. 3, p. 775; N. Stephan Kinsella, "Is Intellectual Property Legitimate?" *Pennsylvania Bar Association Intellectual Property Law Newsletter* 1, no. 2 (Winter 1998), p. 3; Kinsella, "Letter on Intellectual Property Rights," and "In Defense of Napster and Against the Second Homesteading Rule."

F.A. Hayek also appears to be opposed to patents. See *The Collected Works of F.A. Hayek*, vol. 1, *The Fatal Conceit: The Errors of Socialism*, ed. W.W. Bartley (Chicago: University of Chicago Press, 1989), p. 6; and Meiners and Staaf, "Patents, Copyrights, and Trademarks," p. 911. Cole challenges the utilitarian justification for patents and copyright in "Patents and Copyrights: Do the Benefits Exceed the Costs?" See also Fritz Machlup, U.S. Senate Subcommittee On Patents, Trademarks & Copyrights, *An Economic Review of the Patent System*, 85th Cong., 2nd Session, 1958, Study No. 15; Fritz Machlup and Edith Penrose, "The Patent Controversy in the Nineteenth Century," *Journal of Economic History* 10 (1950), p. 1; Roderick T. Long, "The Libertarian Case Against Intellectual Property Rights," *Formulations* 3, no. 1 (Autumn 1995); Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs," *Harvard Law Review* 84 (1970), p. 281; Wendy J. Gordon, "An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory," *Stanford Law Review* 41

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vigorously opposed IP in a debate in the nineteenth century individualist-anarchist periodical *Liberty*.[38] These commentators point out the many problems with conventional utilitarian and natural-rights arguments given to justify IP rights. These and other shortcomings of standard pro-IP arguments are surveyed below.

Utilitarian Defenses of IP

Advocates of IP often justify it on utilitarian grounds. Utilitarians hold that the "end" of encouraging more innovation and creativity justifies the seemingly immoral "means" of restricting the freedom of individuals to use their physical property as they see fit. But there are three fundamental problems with justifying any right or law on strictly utilitarian grounds.

First, let us suppose that wealth or utility could be maximized by adopting certain legal rules; the "size of the pie" is increased. Even then, this does not show that these rules are justified. For example, one could argue that net utility is enhanced by redistributing half of the wealth of society's richest one percent to its poorest ten percent. But even if stealing some of *A*'s property and giving it to *B* increases *B*'s welfare "more" than it diminishes *A*'s (if such a comparison could, somehow, be made), this does not establish that the theft of *A*'s property is justified. Wealth maximization is not the goal of law; rather, the goal is justice—giving each man his due.[39] Even if overall wealth is increased due to IP laws, it does not follow that this allegedly desirable result justifies the unethical violation of some individuals' rights to use their own property as they see fit.

(1989), p. 1343; and Jesse Walker, "Copy Catfight: How Intellectual Property Laws Stifle Popular Culture," *Reason* (March 2000).

[38]McElroy, "Intellectual Property: Copyright and Patent." Also strongly opposed to IP was the nineteenth-century Jacksonian editorialist William Leggett. See Palmer, "Are Patents and Copyrights Morally Justified?" pp. 818, 828–29. Ludwig von Mises expressed no opinion on the issue, merely drawing the economic implications from the presence or absence of such laws. See *Human Action*, 3rd rev. ed. (Chicago: Henry Regnery, 1966), chap. 23, section 6, pp. 661–62.

[39]Acccording to Justinian, "Justice is the constant and perpetual wish to render every one his due. . . . The maxims of law are these: to live honestly, to hurt no one, to give every one his due." *The Institutes of Justinian: Text, Translation, and Commentary*, trans. J.A.C. Thomas (Amsterdam: North-Holland, 1975).

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In addition to ethical problems, utilitarianism is not coherent. It necessarily involves making illegitimate interpersonal utility comparisons, as when the "costs" of IP laws are subtracted from the "benefits" to determine whether such laws are a net benefit.[40] But not all values have a market price; in fact, none of them do. Mises showed that even for goods that have a market price, the price does not serve as a *measure* of the good's value.[41]

Finally, even if we set aside the problems of interpersonal utility comparisons and the justice of redistribution and we plow ahead, employing standard utilitarian measurement techniques, it is not at all clear that IP laws lead to any change—either an increase or a decrease—in overall wealth.[42] It is debatable whether copyrights and

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[40]On the defects of utilitarianism and interpersonal utility comparisons, see Murray N. Rothbard, "Praxeology, Value Judgments, and Public Policy," in *The Logic of Action One* (Cheltenham, U.K.: Edward Elgar, 1997), esp. pp. 90–99; Rothbard, "Toward a Reconstruction of Utility and Welfare Economics," in *The Logic of Action One*; Anthony de Jasay, *Against Politics: On Government, Anarchy, and Order* (London: Routledge, 1997), pp. 81–82, 92, 98, 144, 149–51.

On scientism and empiricism, see Rothbard, "The Mantle of Science," in *The Logic of Action One*; Hans-Hermann Hoppe, "In Defense of Extreme Rationalism: Thoughts on Donald McCloskey's *The Rhetoric of Economics*," *Review of Austrian Economics* 3 (1989), p. 179.

On epistemological dualism, see Ludwig von Mises, *The Ultimate Foundation of Economic Science: An Essay on Method*, 2nd ed. (Kansas City: Sheed Andrews and McMeel, 1962); Ludwig von Mises, *Epistemological Problems of Economics*, trans. George Reisman (New York: New York University Press, 1981); Hans-Hermann Hoppe, *Economic Science and the Austrian Method* (Auburn, Ala.: Ludwig von Mises Institute, 1995); and Hoppe, "In Defense of Extreme Rationalism."

[41]Mises states: "Although it is usual to speak of money as a measure of value and prices, the notion is entirely fallacious. So long as the subjective theory of value is accepted, this question of measurement cannot arise." "On the Measurement of Value," in *The Theory of Money and Credit*, trans. H.E. Batson (1912; reprint, Indianapolis, Ind.: Liberty Fund, 1980), p. 51. Also: "Money is neither a yardstick of value nor of prices. Money does not measure value. Nor are prices measured in money: they are amounts of money." Ludwig von Mises, *Socialism: An Economic and Sociological Analysis*, 3rd rev. ed., trans. J. Kahane (Indianapolis, Ind.: Liberty Press, 1981), p. 99; see also Mises, *Human Action*, pp. 96, 122, 204, 210, 217, and 289.

[42]For an excellent survey and critique of the cost-benefit justification for patent and copyright, see Cole, "Patents and Copyrights: Do the Benefits

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patents really are necessary to encourage the production of creative works and inventions, or that the incremental gains in innovation outweigh the immense costs of an IP system. Econometric studies do not conclusively show net gains in wealth. Perhaps there would even be *more* innovation if there were no patent laws; maybe more money for research and development (R&D) would be available if it were not being spent on patents and lawsuits. It is possible that companies would have an even greater incentive to innovate if they could not rely on a near twenty-year monopoly.[43]

There are undoubtedly costs of the patent system. As noted, patents can be obtained only for "practical" applications of ideas, but not for more abstract or theoretical ideas. This skews resources away from theoretical R&D.[44] It is not clear that society is better off with relatively more practical invention and relatively less theoretical research and development. Additionally, many inventions are patented for defensive reasons, resulting in patent lawyers' salaries and patent office fees. This large overhead would be unnecessary if there were no patents. In the absence of patent laws, for example, companies would not spend money obtaining or defending against such ridiculous patents as those in the Appendix. It simply has not been shown that IP leads to net gains in wealth. But should not those who

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Exceed the Costs?" For useful discussions of evidence in this regard, see Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," pp. 300–2; Palmer, "Are Patents and Copyrights Morally Justified?" pp. 820–21, 850–51; Bouckaert, "What is Property?" pp. 812–13; Leonard Prusak, "Does the Patent System Have Measurable Economic Value?" *AIPLA Quarterly Journal* 10 (1982), pp. 50–59; and Leonard Prusak, "The Economic Theory Concerning Patents and Inventions," *Economica* 1 (1934), pp. 30–51.

[43]See Cole, "Patents and Copyrights: Do the Benefits Exceed the Costs?" for further examples of costs of patent and copyright laws.

[44]Plant, "The Economic Theory Concerning Patents for Inventions," p. 43. See also Rothbard, *Man, Economy, and State*, pp. 658–59: "It is by no means self-evident that patents encourage an increased absolute quantity of research expenditures. But certainly patents distort the *type* of research expenditure being conducted. . . . Research expenditures are therefore *overstimulated* in the early stages before anyone has a patent, and they are *unduly restricted* in the period after the patent is received. In addition, some inventions are considered patentable, while others are not. The patent system then has the further effect of artificially stimulating research expenditures in the *patentable* areas, while artificially restricting research in the *nonpatentable* areas."

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advocate the use of force against others' property have to satisfy a burden of proof?

We must remember that when we advocate certain rights and laws, and inquire into their legitimacy, we are inquiring into the legitimacy and ethics of the use of *force*. To ask whether a law should be enacted or exist is to ask: is it proper to use force against certain people in certain circumstances? It is no wonder that this question is not really addressed by analysis of wealth maximization. Utilitarian analysis is thoroughly confused and bankrupt: talk about increasing the size of the pie is methodologically flawed; there is no clear evidence that the pie increases with IP rights. Further, pie growth does not justify the use of force against the otherwise legitimate property of others. For these reasons, utilitarian IP defenses are unpersuasive.

Some Problems with Natural Rights

Other libertarian proponents of IP argue that certain ideas deserve protection as property rights because they are *created*. Rand supported patents and copyrights as "the legal implementation of the base of all property rights: a man's right to the product of his mind."[45] For Rand, IP rights are, in a sense, the reward for productive work. It is only fair that a creator reap the benefits of others using his creation. For this reason, in part, she opposes *perpetual* patent and copyright—because future, unborn heirs of the original creator are not themselves responsible for the creation of their ancestors' work.

One problem with the creation-based approach is that it almost invariably protects only *certain types* of creations—unless, that is, every single useful idea one comes up with is subject to ownership (more on this below). But the distinction between the protectable and the unprotectable is necessarily arbitrary. For example, philosophical or mathematical or scientific truths cannot be protected under current law on the grounds that commerce and social intercourse would grind to a halt were every new phrase, philosophical truth, and the like considered the exclusive property of its creator. For this reason, patents can be obtained only for so-called "practical applications" of ideas, but not for more abstract or theoretical ideas. Rand agrees with this disparate treatment, in attempting to distinguish between an unpatentable *discovery* and a patentable *invention*. She argues

[45]Rand, "Patents and Copyrights," p. 130.

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that a "scientific or philosophical discovery, which identifies a law of nature, a principle or a fact of reality not previously known" is not *created* by the discoverer.

But the distinction between creation and discovery is not clear-cut or rigorous.[46] Nor is it clear why such a distinction, even if clear, is ethically relevant in defining property rights. No one creates *matter*; they just manipulate and grapple with it according to physical laws. In this sense, no one really creates *anything*. They merely rearrange matter into new arrangements and patterns. An engineer who invents a new mousetrap has rearranged existing parts to provide a function not previously performed. Others who learn of this new arrangement can now also make an improved mousetrap. Yet the mousetrap merely follows laws of nature. The inventor did not invent the matter out of which the mousetrap is made, nor the *facts* and laws exploited to make it work.

Similarly, Einstein's "discovery" of the relation $E=mc^2$, once known by others, allows them to manipulate matter in a more efficient way. Without Einstein's, or the inventor's, efforts, others would have been *ignorant* of certain causal laws, of ways matter can be manipulated and utilized. Both the inventor and the theoretical scientist engage in creative mental effort to produce useful, new ideas. Yet one is rewarded, and the other is not. In one recent case, the inventor of a new way to calculate a number representing the shortest path between two points—an extremely useful technique—was not given patent protection because this was "merely" a mathematical algorithm.[47] But it is arbitrary and unfair to reward more practical

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[46]Plant is correct in stating that "[t]he task of distinguishing a scientific discovery from its practical application, which may be patentable . . . is often baffling to the most subtle lawyer." "The Economic Theory Concerning Patents for Inventions," pp. 49–50. On a related note, the U.S. Supreme Court has noted that "[t]he specification and claims of a patent . . . constitute one of the most difficult legal instruments to draw with accuracy." *Topliff v Topliff*, 145 US 156, 171, 12 S.Ct. 825 (1892). Perhaps this is because patent law has no moorings to objective borders of actual, tangible property, and thus is inherently vague, amorphous, ambiguous, and subjective. For the latter reason alone, one would think that Objectivists —ardent, self-proclaimed defenders of objectivity and opponents of subjectivism—would oppose patent and copyright.

[47]*In re Trovato*, 33 USPQ2d 1194 (Fed Cir 1994). Recent case law has expanded the types of mathematical and computer algorithms and business methods that can be protected by patent. See, e.g., *State Street Bank & Trust*

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inventors and entertainment providers, such as the engineer and songwriter, and to leave more theoretical science and math researchers and philosophers unrewarded. The distinction is inherently vague, arbitrary, and unjust.

Moreover, adopting a limited term for IP rights, as opposed to a perpetual right, also requires arbitrary rules. For example, patents last for twenty years from the filing date, while copyrights last, in the case of individual authors, for seventy years past the author's death. No one can seriously maintain that nineteen years for a patent is too short, and twenty-one years too long, any more than the current price for a gallon of milk can be objectively classified as too low or too high.

Thus, one problem with the natural-rights approach to validating IP is that it necessarily involves arbitrary distinctions with respect to what classes of creations deserve protection, and concerning the length of the term of the protection.

Of course, one way to avoid this difficulty is to claim that *everything* is protectable by IP, with perpetual (infinite) terms. Spooner,[48] for example, advocated perpetual rights for patent and copyright. Schulman advocates a much broader concept of creations or ideas protectable by IP. He argues for property rights called "logo-rights" in any "logos" that one creates. The logos is the "material identity" or identity-pattern of created things. The owner of a logos would own the order or pattern of information imposed upon, or observed in, material substances.

The most radical of all IP proponents is Andrew Joseph Galambos, whose ideas, to the extent that I understand them, border on the absurd.[49] Galambos believed that man has property rights in his own

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Co. v Signature Financial Group, 149 F3d 1368 (Fed Cir 1998). However, no matter where the line is drawn between unpatentable "laws of nature" and "abstract ideas" and patentable "practical applications," patent law still necessarily makes a distinction between the two.

[48]Spooner, "The Law of Intellectual Property"; McElroy, "Intellectual Property: Copyright and Patent"; Palmer, "Are Patents and Copyrights Morally Justified?" pp. 818, 825.

[49]See Galambos, *The Theory of Volition*, vol. 1. Evan R. Soulé, Jr., "What Is Volitional Science?" http://www.tuspco.com/html/what_is_v-50_.html. I have read only sketchy accounts of Galambos's theories. I also met a real, live Galambosian once, much to my surprise (I had supposed that they were fictional creations of Tuccille [*It Usually Begins with Ayn Rand*, pp. 69–71]),

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life (primordial property) and in all "non-procreative derivatives of his life."[50] Since the "first derivatives" of a man's life are his thoughts and ideas, thoughts and ideas are "primary property." Since action is based on primary property (ideas), actions are owned as well; this is referred to as "liberty." Secondary derivatives, such as land, televisions, and other tangible goods, are produced by ideas and action. Thus, property rights in tangible items are relegated to lowly secondary status, as compared with the "primary" status of property rights in ideas. (Even Rand once elevated patents over mere property rights in tangible goods, in her bizarre notion that "patents are the heart and core of property rights."[51] Can we really believe that there were no property rights respected before the 1800s, when patent rights became systematized?)

Galambos reportedly took his own ideas to ridiculous lengths, claiming a property right in his own ideas and requiring his students not to repeat them;[52] dropping a nickel in a fund box every time he used the word "liberty," as a royalty to the descendants of Thomas Paine, the alleged "inventor" of the word "liberty"; and changing his original name from Joseph Andrew Galambos (Jr., presumably) to Andrew Joseph Galambos, to avoid infringing his identically-named father's rights to the name.[53]

By widening the scope of IP, and by lengthening its duration to avoid making such arbitrary distinctions as Rand does, the absurdity and injustice caused by IP becomes even more pronounced (as Galambos demonstrates). And by extending the term of patents and copyrights to infinity, subsequent generations would be choked by ever-growing restraints on their own use of property. No one would be able to manufacture—or even use—a light bulb without getting permission from Edison's heirs. No one would even be able to build

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at a Mises Institute conference a few years ago. My criticism of Galambos's ideas in what follows only applies to the extent that I am properly describing his views.

[50]Friedman, "In Defense of Private Orderings," n. 52; Foerster, "The Basics of Economic Government."

[51]Rand, "Patents and Copyrights," p. 133.

[52]Friedman, "In Defense of Private Orderings," n. 52.

[53]Tuccille, *It Usually Begins with Ayn Rand*, p. 70. Of course, I suppose that any Galambosian other than Galambos himself, having the same type of dilemma, would be unable to change his name as a solution to the problem, because this solution was Galambos's inalienable, "absolute" idea.

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a house without getting permission from the heirs of the first proto-human who left the caves and built a hut. No one could use a variety of life-saving techniques, chemicals, or treatments without obtaining permission of various lucky, rich descendants. No one would be able to boil water to purify it, or use pickling to preserve foods, unless he is granted license by the originators (or their distant heirs) of such techniques.

Such unbounded ideal rights would pose a serious threat to tangible-property rights, and would threaten to overwhelm them. All use of tangible property would by now be impossible, as every conceivable use of property, every single action, would be bound to infringe upon one of the millions of past, accreted IP rights, and the human race would die of starvation. But, as Rand noted, men are not ghosts; we have a spiritual aspect, but also a physical one.[54] Any system that elevates rights in ideas to such an extreme that it overrides rights in tangible things is clearly not a suitable ethical system for living, breathing human beings. No one living can actually act in accordance with such an unrestricted view of IP. The remaining advocates of IP all qualify their endorsement by limiting the scope and/or terms of IP rights, thus adopting the ethically arbitrary distinctions noted above.

A deeper problem for the natural-rights position lies in its undue emphasis on "creation," instead of scarcity, as giving rise to property rights, as discussed below.

IP and Property Rights

Property and Scarcity

Let us take a step back and look afresh at the idea of property rights. Libertarians believe in property rights in tangible goods (resources). Why? What is it about tangible goods that makes them subjects for property rights? Why are tangible goods property?

A little reflection will show that it is these goods' *scarcity*—the fact that there can be *conflict* over these goods by multiple human actors. The very possibility of conflict over a resource renders it scarce, giving rise to the need for ethical rules to govern its use. Thus, the fundamental social and ethical function of property rights is to

[54]Harry Binswanger, ed., *The Ayn Rand Lexicon: Objectivism from A to Z* (New York: New American Library, 1986), pp. 326–27, 467.

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prevent interpersonal conflict over scarce resources.[55] As Hoppe notes:

> [O]nly because scarcity exists is there even a problem of formulating moral laws; insofar as goods are superabundant ("free" goods), no conflict over the use of goods is possible and no action-coordination is needed. Hence, it follows that *any* ethic, correctly conceived, must be formulated as a theory of property, i.e., a theory of the assignment of rights of exclusive control over scarce means. Because only then does it become possible to avoid otherwise inescapable and unresolvable conflict.[56]

Others who recognize the importance of scarcity in defining what property *is* include Plant, Hume, Palmer, Rothbard, and Tucker.[57]

Nature, then, contains things that are economically scarce. My use of such a thing *conflicts* with (excludes) your use of it, and vice-versa. The function of property rights is to prevent interpersonal conflict over scarce resources, by allocating exclusive ownership of resources to specified individuals (owners). To perform this function, property rights must be both *visible* and *just*. Clearly, in order for individuals to avoid using property owned by others, property borders and property rights must be objective (intersubjectively ascertainable); they must be *visible*.[58] For this reason, property rights

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[55]The fundamental economic, or catallactic, role for private property rights, along with money prices arising from exchanges of property, is to permit *economic calculation*. See N. Stephan Kinsella, "Knowledge, Calculation, Conflict, and Law: Review Essay of Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law*," *Quarterly Journal of Austrian Economics* 2, no. 4 (Winter 1999), pp. 49–71.

[56]Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Boston: Kluwer Academic Publishers, 1989), p. 235 n. 9.

[57]Plant, "The Economic Theory Concerning Patents for Inventions," pp. 35–36; David Hume, *An Inquiry Concerning the Principles of Morals: With a Supplement: A Dialogue* (1751; reprint, New York: Liberal Arts Press, 1957); Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," pp. 261–66 and n. 50 (distinguishing between "static" and "dynamic" scarcity), also pp. 279–80; Palmer, "Are Patents and Copyrights Morally Justified?" pp. 860–61, 864–65; and Rothbard, "Justice and Property Rights," in *The Logic of Action One*, p. 274; on Tucker, see McElroy, "Intellectual Property: Copyright and Patent."

[58]Hoppe, *A Theory of Socialism and Capitalism*, pp. 140–41. I do not mean to restrict rights to the sighted; the term "visible" here means observable or discernible. I owe this clarification to Gene Callahan.

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must be objective and unambiguous. In other words, "good fences make good neighbors."[59]

Property rights must be demonstrably *just*, as well as visible, because they cannot serve their function of preventing conflict unless they are acceptable as fair by those affected by the rules.[60] If property rights are allocated unfairly, or simply grabbed by force, this is like having no property rights at all; it is merely might versus right again, i.e., the pre-property rights situation. But as libertarians recognize, following Locke, it is only the *first occupier* or user of such property that can be its natural owner. Only the first-occupier homesteading rule provides an objective, ethical, and non-arbitrary allocation of ownership in scarce resources.[61] When property rights in scarce means are allocated in accordance with first-occupier homesteading rules, property borders are visible, and the allocation is demonstrably just. Conflict can be avoided with such property rights in place because third parties can see and, thus, sidestep the property borders, and be motivated to do so because the allocation is just and fair.

But surely it is clear, given the origin, justification, and function of property rights, that they are applicable only to *scarce* resources.

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[59]Robert Frost, "The Mending Wall," in *North of Boston*, 2nd ed. (New York: Henry Holt, 1915), pp. 11–13. (Please do not e-mail me about this. I do not care what Frost "really" meant in that poem. I just like the saying.)

[60]Hoppe, *A Theory of Socialism and Capitalism*, p. 138.

[61]See, on the proper approach to homesteading and the first-user rule (the prior-later distinction), Hoppe, *A Theory of Socialism and Capitalism*, pp. 141–44; Hoppe, *The Economics and Ethics of Private Property* (Boston: Kluwer Academic Publishers, 1993), pp. 191–93; Jeffrey M. Herbener, "The Pareto Rule and Welfare Economics," *Review of Austrian Economics* 10, no. 1 (1997), p. 105: "Once the item is owned by the first-user, others no longer have the option of being its first-user; thus, their preferences at that point in time have no bearing on the Pareto-superior nature of the acquisition by the first-user"; and de Jasay, *Against Politics*, pp. 172–79. On the ethical justifications of such a property-rights scheme, see Hoppe, *A Theory of Socialism and Capitalism*, chap. 7; Hoppe, *The Economics and Ethics of Private Property*; Rothbard, *The Ethics of Liberty*; Rothbard, "Justice and Property Rights," in *The Logic of Action One*; N. Stephan Kinsella, "A Libertarian Theory of Punishment and Rights" *Loyola of Los Angeles Law Review* 30 (Spring 1996), p. 607; N. Stephan Kinsella, "New Rationalist Directions in Libertarian Rights Theory," *Journal of Libertarian Studies* 12, no. 2 (Fall 1996), pp. 313–26.

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Were we in a Garden of Eden where land and other goods were infinitely abundant, there would be no scarcity and, therefore, no need for property rules; property concepts would be meaningless. The idea of conflict, and the idea of rights, would not even arise. For example, your taking my lawnmower would not really deprive me of it if I could conjure up another in the blink of an eye. Lawnmower-taking in these circumstances would not be "theft." Property rights are not applicable to things of infinite abundance, because there cannot be conflict over such things.

Thus, property rights must have objective, discernible borders, and must be allocated in accordance with the first-occupier homesteading rule. Moreover, property rights can apply only to scarce resources. The problem with IP rights is that the ideal objects protected by IP rights are not scarce; and, further, that such property rights are not, and cannot be, allocated in accordance with the first-occupier homesteading rule, as will be seen below.

Scarcity and Ideas

Like the magically-reproducible lawnmower, ideas are not scarce. If I invent a technique for harvesting cotton, your harvesting cotton in this way would not take away the technique from me. I still have my technique (as well as my cotton). Your use does not exclude my use; we could both use my technique to harvest cotton. There is no economic scarcity, and no possibility of conflict over the use of a scarce resource. Thus, there is no need for exclusivity.

Similarly, if you copy a book I have written, I still have the original (tangible) book, and I also still "have" the pattern of words that constitute the book. Thus, authored works are not scarce in the same sense that a piece of land or a car are scarce. If you take my car, I no longer have it. But if you "take" a book-pattern and use it to make your own physical book, I still have my own copy. The same holds true for inventions and, indeed, for any "pattern" or information one generates or has. As Thomas Jefferson—himself an inventor, as well as the first Patent Examiner in the U.S.—wrote, "He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."[62] Since use of another's idea does not deprive him of its use,

[62]Thomas Jefferson to Isaac McPherson, Monticello, August 13, 1813, letter, in *The Writings of Thomas Jefferson*, vol. 13, ed. A.A. Lipscomb and

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no conflict over its use is possible; ideas, therefore, are not candidates for property rights. Even Rand acknowledged that "intellectual property cannot be consumed."[63]

Ideas are not naturally scarce. However, by recognizing a right in an ideal object, one *creates* scarcity where none existed before. As Arnold Plant explains:

> It is a peculiarity of property rights in patents (and copyrights) that they do not arise out of the scarcity of the objects which become appropriated. They are not a *consequence* of scarcity. They are the deliberate creation of statute law, and, whereas in general the institution of private property makes for the preservation of scarce goods, tending . . . to lead us "to make the most of them," property rights in patents and copyrights make possible the *creation* of a scarcity of the products appropriated which could not otherwise be maintained.[64]

A.E. Bergh (Washington, D.C.: Thomas Jefferson Memorial Association, 1904), pp. 326–38. Jefferson recognized that because ideas are not scarce, patent and copyright are not natural rights, and can be justified only, if at all, on the utilitarian grounds of promoting useful inventions and literary works (and, even then, they must be created by statute, since they are not natural rights). See Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," p. 278 n. 53. Yet this does not mean that Jefferson supported patents, even on utilitarian grounds. Patent historian Edward C. Walterscheid explains that "throughout his life, [Jefferson] retained a healthy skepticism about the value of the patents system." "Thomas Jefferson and the Patent Act of 1793," *Essays in History* 40 (1998).

[63]Rand, "Patents and Copyrights," p. 131. Mises, in *Human Action*, p. 661, recognizes that there is no need to economize in the employment of "formulas," "because their serviceableness cannot be exhausted." On p. 128, he points out: "A thing rendering such unlimited services is, for instance, the knowledge of the causal relation implied. The formula, the recipe that teaches us how to prepare coffee, provided it is known, renders unlimited services. It does not lose anything from its capacity to produce however often it is used; its productive power is inexhaustible; it is therefore not an economic good. Acting man is never faced with a situation in which he must choose between the use-value of a known formula and any other useful thing." See also p. 364.

[64]Plant, "The Economic Theory Concerning Patents for Inventions," p. 36. Also Mises, *Human Action*, p. 364: "Such recipes are, as a rule, free goods as their ability to produce definite effects is unlimited. They can become economic goods only if they are monopolized and their use is restricted. Any price paid for the services rendered by a recipe is always a monopoly

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Bouckaert also argues that natural scarcity is what gives rise to the need for property rules, and that IP laws create an artificial, unjustifiable scarcity. As he notes:

> Natural scarcity is that which follows from the relationship between man and nature. Scarcity is natural when it is possible to conceive of it before any human, institutional, contractual arrangement. Artificial scarcity, on the other hand, is the outcome of such arrangements. Artificial scarcity can hardly serve as a justification for the legal framework that causes that scarcity. Such an argument would be completely circular. On the contrary, artificial scarcity itself needs a justification.[65]

Thus, Bouckaert maintains that "only naturally scarce entities over which physical control is possible are candidates for" protection by *real* property rights.[66] For ideal objects, the only protection possible is that achievable through *personal* rights, i.e., contract (more on this below).[67]

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price. It is immaterial whether the restriction of a recipe's use is made possible by institutional conditions—such as patents and copyright laws—or by the fact that a formula is kept secret and other people fail to guess it."

[65]Bouckaert, "What is Property?" p. 793; see also pp. 797–99.

[66]Bouckaert, "What is Property?" pp. 799, 803.

[67]It could also be argued that ideal objects deserve legal protection as property because they are "public goods," that is, because of negative externalities which arise if IP is not legally protected. However, the concept of public goods is neither coherent nor justifiable. See Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," pp. 279–80, 283–87; Hans-Hermann Hoppe, "Fallacies of the Public Goods Theory and the Production of Security," *Journal of Libertarian Studies* 9, no. 1 (Winter 1989), p. 27; also Hoppe, *The Economics and Ethics of Private Property*, chap. 1. As Palmer points out: "the cost of producing any service or good includes not only labor, capital marketing, and other cost components, but also fencing (or exclusion) costs as well. Movie theaters, for example, invest in exclusion devices like ticket windows, walls, and ushers, all designed to exclude non-contributors from enjoyment of service. Alternatively, of course, movie owners could set up projectors and screens in public parks and then attempt to prevent passers-by from watching, or they could ask government to force all non-contributors to wear special glasses which prevent them from enjoying the movie. 'Drive-ins,' faced with the prospect of free riders peering over the walls, installed—at considerable expense—individual speakers for each car, thus rendering the publicly available visual part of the movie of little interest. . . . The costs

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Only tangible, scarce resources are the possible object of interpersonal conflict, so it is only for them that property rules are applicable. Thus, patents and copyrights are unjustifiable monopolies granted by government legislation. It is not surprising that, as Palmer notes, "[m]onopoly privilege and censorship lie at the historical root of patent and copyright."[68] It is this monopoly privilege that creates an artificial scarcity where there was none before.

Let us recall that IP rights give to pattern-creators partial rights of control—ownership—over the tangible property of everyone else. The pattern-creator has partial ownership of others' property, by virtue of his IP right, because he can prohibit them from performing certain actions *with their own property*. Author *X*, for example, can prohibit a third party, *Y*, from inscribing a certain pattern of words on *Y*'s own blank pages with *Y*'s own ink.

That is, by merely authoring an original expression of ideas, by merely thinking of and recording some original *pattern* of information, or by finding a new way to use his own property (recipe), the IP creator instantly, magically becomes a partial owner of others' property. He has some say over how third parties can use their property. IP rights change the *status quo* by redistributing property from individuals of one class (tangible-property owners) to individuals of another (authors and inventors). *Prima facie*, therefore, IP law trespasses against or "takes" the property of tangible property owners, by transferring partial ownership to authors and inventors. It is this invasion and redistribution of property that must be justified in order for IP rights to be valid. We see, then, that utilitarian defenses do not do the trick. Further problems with natural-rights defenses are explored below.

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of exclusion are involved in the production of virtually every good imaginable. There is no compelling justification for singling out some goods and insisting that the state underwrite their production costs through some sort of state-sanctioned collective action, simply because of a decision to make the good available on a nonexclusive basis." Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," pp. 284–85. There is no way to show that ideas are clearly public goods. Moreover, even if ideas were public goods, this does not justify treating them as property rights, for the same reasons that even wealth-increasing measures are not necessarily justified, as discussed above.

[68]Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," p. 264.

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Creation vs. Scarcity

Some inconsistencies and problems with natural-rights theories of IP were pointed out above. This section discusses further problems with such arguments, in light of the preceding discussion of the significance of scarcity.

As noted before, some libertarian IP advocates, such as Rand, hold that *creation* is the source of property rights.[69] This confuses the nature and reasons for property rights, which lie in the undeniable fact of scarcity. *Given* scarcity and the correspondent possibility of conflict in the use of resources, conflicts are avoided and peace and cooperation are achieved by allocating property rights to such resources. And the purpose of property rights dictates the nature of such rules. For if the rules allocating property rights are to serve as objective rules that all can agree upon so as to avoid conflict, they cannot be biased or arbitrary.[70] For this reason, unowned resources come to be owned—homesteaded or appropriated—by the *first* possessor.[71]

The general rule, then, is that ownership of a given scarce resource can be identified by determining who first occupied it. There are various ways to possess or occupy resources, and different ways to demonstrate or prove such occupation, depending upon the nature of the resource and the use to which it is put. Thus, I can pluck an apple from the wild and thereby homestead it, or I can fence in a plot of land for a farm. It is sometimes said that one form of occupation is "forming" or "creating" the thing.[72] For example, I can sculpt a statue from a block of marble, or forge a sword from raw metal, or even "create" a farm on a plot of land.

We can see from these examples that creation is relevant to the question of ownership of a given "created" scarce resource, such as

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[69]See Rand, "Patents and Copyrights"; Kelley, "Response to Kinsella"; Franck, "Intellectual and Personality Property" and "Intellectual Property Rights: Are Intangibles True Property?"

[70]See Hoppe, *A Theory of Socialism and Capitalism*, chap. 7, esp. p. 138.

[71]Hoppe, *A Theory of Socialism and Capitalism*, p. 142; de Jasay, *Against Politics*, pp. 172–79; and Herbener, "The Pareto Rule and Welfare Economics," p. 105.

[72]Occupancy or taking possession "can take three forms: (1) by directly grasping it physically, (2) by forming it, and (3) by merely marking it as ours." Palmer, "Are Patents and Copyrights Morally Justified?" p. 838.

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a statue, sword, or farm, only to the extent that the act of creation *is* an act of occupation, or is otherwise evidence of first occupation. However, "creation" itself does not justify ownership in things; it is neither necessary nor sufficient. One cannot *create* some possibly disputed scarce resource without first using the raw materials used to create the item. But these raw materials are scarce, and either I own them or I do not. If not, then I do not own the resulting product. If I own the inputs, then, by virtue of such ownership, I own the resulting thing into which I transform them.

Consider the forging of a sword. If I own some raw metal (because I mined it from ground I owned), then I own the same metal after I have shaped it into a sword. I do not need to rely on the fact of creation to own the sword, but only on my ownership of the factors used to make the sword.[73] And I do not need creation to come to own the factors, since I can homestead them by simply mining them from the ground and thereby becoming the first possessor. On the other hand, if I fashion a sword using *your* metal, I do *not* own the resulting sword. In fact, I may owe you damages for trespass or conversion.

Creation, therefore, is neither necessary nor sufficient to establish ownership. The focus on creation distracts from the crucial role of first occupation as a property rule for addressing the fundamental fact of scarcity. First occupation, not creation or labor, is both necessary and sufficient for the homesteading of unowned scarce resources.

One reason for the undue stress placed on creation as the source of property rights may be the focus by some on *labor* as the means to homestead unowned resources. This is manifest in the argument that one homesteads unowned property with which one mixes one's labor *because* one "owns" one's labor. However, as Palmer correctly points out, "*occupancy, not labor*, is the act by which external things become property."[74] By focusing on first occupancy, rather than on labor, as the key to homesteading, there is no need to place creation as the fount of property rights, as Objectivists and others do.

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[73]I also do not need to rely on "ownership" of my labor; strictly speaking, labor cannot be owned, and labor ownership need not be relied on to show that I maintain ownership of my property as I transform it.

[74]Palmer, "Are Patents and Copyrights Morally Justified?" p. 838 (emphasis added), citing Georg W.F. Hegel, *Hegel's Philosophy of Right*, trans. T.M. Knox. (1821; reprint, London: Oxford University Press, 1967), pp. 45–46.

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Instead, property rights must be recognized in first-comers (or their contractual transferees) in order to avoid the omnipresent problem of conflict over scarce resources. Creation itself is neither necessary nor sufficient to gain rights in unowned resources. Further, there is no need to maintain the strange view that one "owns" one's labor in order to own things one first occupies. Labor is a type of action, and action is not ownable; rather, it is the way that some tangible things (e.g., bodies) act in the world.

The problem with the natural rights defense of IP, then, lies in the argument that because an author–inventor "creates" some "thing," he is "thus" entitled to own it. The argument begs the question by assuming that the ideal object is ownable in the first place; once this is granted, it seems natural that the "creator" of this piece of property is the natural and proper owner of it. However, ideal objects are not ownable.

Under the libertarian approach, *when* there is a scarce (ownable) resource, we identify its owner by determining who its first occupier is. In the case of "created" goods (i.e., sculptures, farms, etc.), it can sometimes be assumed that the creator is also the first occupier by virtue of the gathering of raw materials and the very act of creation (imposing a pattern on the matter, fashioning it into an artifact, and the like). But it is not creation *per se* that gives rise to ownership, as pointed out above.[75] For similar reasons, the Lockean idea

[75]Even such advocates of IP as Rand do not maintain that creation *per se* is sufficient to give rise to rights, or that creation is even necessary. It is not necessary because unowned property can be homesteaded by simply occupying it, which involves no "creation" unless one stretches the concept without limit. It is also not sufficient, because Rand would certainly not hold that creating an item using raw material owned by *others* gives the thief–creator ownership of the item. Rand's view even implies that rights, including property rights, only arise when there is a possibility of conflict. Rand, for example, views rights as a social concept arising only when there is more than one person. See Rand, "Man's Rights," in *Capitalism: The Unknown Ideal*, p. 321: "A 'right' is a moral principle defining and sanctioning a man's freedom of action in a social context." Indeed, as Rand argues, "Man's rights can be violated only by the use of physical force," i.e., some conflict over a scarce resource. "The Nature of Government," in *Capitalism: The Unknown Ideal*, p. 330. On p. 334, Rand attempts (unsuccessfully) to justify government, the agent that enforces rights, based on the fact that there can be "honest disagreements"—i.e., conflict—even among "fully rational and faultlessly moral" men. So, in Rand's theory,

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of "mixing labor" with a scarce resource is relevant only because it *indicates* that the user has *possessed* the property (for property must be possessed in order to be labored upon). It is not because the labor must be rewarded, nor because we "own" labor and "therefore" its fruits. In other words, creation and labor-mixing *indicate* when one has occupied—and, thus, homesteaded—unowned scarce resources.[76]

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creation *per se* is neither necessary nor sufficient, just as in the theory of property advocated herein.

[76]It is for these reasons that I disagree with the creation-centered approach of Objectivists David Kelley and Murray Franck. According to Franck, "Intellectual and Personality Property," p. 7, "although property rights help 'ration' scarcity, scarcity is not the basis of property rights. The view that it *is* . . . appears to reverse cause and effect in that it sees rights as a function of society's needs rather than as inherent in the individual who in turn must live in society."

I am not sure what it means to say that rights, which are relational concepts that only apply in a social context, are "inherent" in an individual, or that they are "functions" of anything. The former notion verges on the positivistic (in implying rights have a "source," as if they could be decreed by God or government), and the latter borders on the scientistic (in using the precise mathematical and natural-sciences notion of "functions"). And the argument for property rights is not based on a need to "ration" scarce items, but, instead, on the need of individuals to employ means to achieve ends, and to avoid interpersonal conflict over such means. Thus, scarcity is not the "basis" for property rights, but a necessary background condition that must obtain before property rights can arise or make sense; conflict can arise only over scarce resources, not abundant ones. (As pointed out in the preceding footnote, Objectivism also holds that conflict-possibility is just such a necessary condition for property rights.)

Moreover, the scarcity-based argument set forth here is no more a "function of society's needs" than is Franck's Objectivist approach. Franck believes that men "need" to be able to create things in order to survive—in a social setting where the presence of other men makes disputes possible. "Thus," law should protect rights to created things. But the scarcity-based argument recognizes that men "need" to be able to use scarce resources and that this requires conflicts to be avoided; thus, law should allocate property rights in scarce resources. Whatever the relative merits of the creation-based and the scarcity-based positions, the scarcity argument is not more collectivist than the creation argument, and the creation argument is not more individualist than the scarcity argument.

Kelley, in "Response to Kinsella," p. 13, writes: "Property rights are required because man needs to support his life by the use of his reason. The primary task in this regard is to create values that satisfy human needs,

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By focusing on creation and labor, rather than on first occupancy of scarce resources, as the touchstone of property rights, IP advocates are led to place undue stress on the importance of "rewarding" the labor of the creator, much as Adam Smith's flawed labor theory of value led to Marx's even more deeply-flawed communist views on exploitation.[77] As noted above, for Rand, IP rights are, in

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rather than relying on what we find in nature, as animals do. . . . [T]he essential basis of property rights lies in the phenomenon of creating value. . . . Scarcity becomes a relevant issue when we consider the use of things in nature, such as land, as inputs to the process of creating value. As a general rule, I would say that two conditions are required in order to appropriate things in nature and make them one's property: 1) one must put them to some productive use, and 2) that productive use must require exclusive control over them, i.e., the right to exclude others. . . . Condition (2) holds only when the resource is scarce. But for things that one has created, such as a new product, one's act of creation is the source of the right, *regardless of scarcity*" (emphasis added).

My reasons for disagreeing with Kelley here should be apparent, but let me point out that all human action, including creation of "values," has to rely on the use of scarce means, that is, the material stuff of the world. Each act of creation employs things made of already existing atoms; neither this fact, nor the recognition of it, is animal-like in any pejorative sense. That men, as opposed to animals, wish to create higher-order values by using scarce resources does not change this analysis. Second, Kelley advocates *two* separate rules for homesteading scarce resources: by first use of the resource, and by creating a new, useful, or artistic pattern with one's own property, which gives the creator the right to stop all others from using a similar pattern, even with their own property. As discussed below, these two homesteading rules are in conflict, and only the former can be justified. Finally, Kelley states that the creator of a new product owns it because he created it, regardless of scarcity. If Kelley here means a tangible product, such as a mousetrap, such a good is an actual, scarce, tangible thing. Presumably, the creator owned the scarce raw materials which he transformed into the final product. But he does not need to have a right in the ideal object of the mousetrap-idea or pattern in order to own the final product itself; he already owned the raw materials, and still owns them after he reshapes them. If Kelley instead means that, by creating a pattern or idea, one acquires the right of control over all others' scarce resources, then he is advocating a new type of homesteading rule, which I criticize below.

[77]See, e.g., Murray N. Rothbard, *Economic Thought Before Adam Smith: An Austrian Perspective on the History of Economic Thought,* vol. 1 (Brookfield, Vt.: Edward Elgar, 1995), p. 453: "It was, indeed, Adam Smith who was almost solely responsible for the injection into economics of the labour

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a sense, the reward for productive work, i.e., *labor*. Rand and other natural-rights IP proponents seem to adopt a mixed natural rights–utilitarian rationale in holding that the person who invests time and effort must be rewarded or benefit from this effort (e.g., Rand opposed perpetual patent and copyright on the grounds that because distant descendants did not create their ancestors' works, they deserve no reward).[78]

In addition, in a strange admixture of natural-rights and utilitarian thinking, the natural-rights IP approach implies that something is property if it can hold *value*. But as Hoppe has trenchantly shown, one cannot have a property right in the *value* of one's property, but only in its physical integrity.[79] Moreover, many arbitrarily-defined "things" can acquire economic value if government grants a monopoly over the thing's use, even if the thing is not otherwise a scarce resource (e.g., the Postal Service's monopoly power to deliver first-class letters).

Thus, because ideas are not scarce resources in the sense that physical conflict over their use is possible, they are not the proper subject of property rights designed to avoid such conflicts.

Two Types of Homesteading

What, though, is really wrong with recognizing "new" property rights? After all, since new ideas, artistic creations, and innovations continually enrich us, what is the harm in moving with the times by recognizing new forms of property? The problem is that if property rights are recognized in non-scarce resources, this necessarily means

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theory of value. And hence it was Smith who may plausibly be held responsible for the emergence and the momentous consequences of Marx." Even otherwise sound thinkers sometimes place undue stress on the importance of labor to the homesteading process and its ability to be "owned." Rothbard himself, for instance, implies that an individual "owns his own person and therefore *his own labor*." Rothbard, "Justice and Property Rights," p. 284, emphasis added; see also Rothbard, *The Ethics of Liberty*, p. 49. It is a misleading metaphor to speak of "owning one's labor" (or one's life or ideas). The right to use or profit from one's labor is only a *consequence* of being in control of one's body, just as the right to "free speech" is only a consequence, or a derivative, of the right to private property, as Rothbard recognized in *The Ethics of Liberty*, esp. chap. 15.

[78]See also Reisman, *Capitalism*, pp. 388–89.

[79]Hoppe, *A Theory of Socialism and Capitalism*, pp. 139–41, 237 n. 17.

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that property rights in tangible resources are correspondingly diminished. This is because the only way to recognize ideal rights, in our real, scarce world, is to allocate rights in tangible goods. For me to have an effective patent right—a right in an idea or pattern, not in a scarce resource—means that I have some control over everyone else's scarce resources.

In fact, we can see that IP rights imply a *new* rule for acquiring rights in scarce resources, which undercuts the libertarian homesteading principle. For, according to Lockean–libertarian homesteading, it is the *first occupier* of a previously unowned scarce resource who homesteads it, i.e., becomes its owner. A late-comer who seizes control of all or part of such owned property is simply a thief, because the property is already owned. The thief effectively proposes a new and arbitrary homesteading rule to replace the first-occupier rule, namely, the particularistic rule "*I* become the owner of property when I forcibly take it from you." Of course, such a rule is no rule at all, and is clearly inferior to the first-possessor rule. The thief's rule is particular, not universal; it is not just, and it certainly is not designed to avoid conflicts.

Proponents of IP must also advocate a new homesteading rule to supplement, if not replace, the first-possessor homesteading rule. They must maintain that there is a *second* way for an individual to come to own tangible property. To wit, the IP advocate must propose some homesteading rule along the following lines: "A person who comes up with some useful or creative idea which can guide or direct an actor in the *use* of his own tangible property thereby instantly gains a right to control all other tangible property in the world, with respect to that property's similar use." This new-fangled homesteading technique is so powerful that it gives the creator rights in third parties' *already owned* tangible property.

For example, by inventing a new technique for digging a well, the inventor can prevent *all others* in the world from digging wells in this manner, *even on their own property*. To take another example, imagine the time when men lived in caves. One bright guy—let's call him Galt-Magnon—decides to build a log cabin on an open field, near his crops. To be sure, this is a good idea, and others notice it. They naturally imitate Galt-Magnon, and they start building their own cabins. But the first man to invent a house, according to IP advocates, would have a right to prevent others from building houses on their own land, with their own logs, or to charge them a

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fee if they do build houses. It is plain that the innovator in these examples becomes a *partial owner* of the tangible property (e.g., land and logs) of others, due *not* to first occupation and use of that property (for it is already owned), but due to his *coming up with an idea*. Clearly, this rule flies in the face of the first-user homesteading rule, arbitrarily and groundlessly overriding the very homesteading rule that is at the foundation of all property rights.

There is, in fact, no reason why merely innovating gives the innovator partial ownership of property that others already own. Just because a rule can be proposed does not mean that it is workable or just. There are many arbitrary rules one could dream up by which property rights could be allocated. For example, a racist could propose that any white person can homestead any property already first homesteaded by a black person. Or: the *third* occupier of a scarce resource becomes its owner. Or: the state can homestead all capital goods, even if already first acquired by individuals. Or: by legislative decree, the state can homestead, in the form of taxes, part of the estates that are already owned by private individuals. All such arbitrary homesteading rules, including the IP rule that innovators homestead partial control of all others' tangible resources, are unjustifiable. They all conflict with the only justifiable homesteading rule, *first occupation*. None of them establish fair, objective rules that avoid interpersonal conflict over scarce resources. Discussions of protecting rights in "ideas," "creations," or "things of value" only serves to obscure the fact that the proponent of IP opposes the unadulterated right to homestead and own private property.

IP AS CONTRACT

The Limits of Contract

The law, then, should protect individual rights to one's body, and to legitimately acquired scarce resources (property). There is not a natural right to ideal objects—to one's intellectual innovations or creations—but only to scarce resources. Many opponents of IP rights typically support only *contractual* arrangements to protect ideas and innovations—private contracts between property owners.[80] Suppose,

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[80]See McElroy, "Intellectual Property: Copyright and Patent"; Roy Halliday, "Ideas as Property," *Formulations* 4, no. 4 (Summer 1997); Bouckaert, "What is Property?" pp. 804–5; Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," pp. 280, 291–95; Palmer, "Are

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for example, that A writes a book and sells physical copies of it to numerous purchasers $B_1, B_2 \ldots B_N$, with a contractual condition that each buyer B is obligated not to make or sell a copy of the text. Under all theories of contract, any of the buyers B becomes liable to A, at least for damages, if he violates these provisions.[81]

But the advocates of the contractual approach to IP are mistaken if they believe that private contract can be used to recreate the same type of protection afforded by modern IP rights. Patent and copyright are good against *all* third parties, regardless of their consent to a contract. They are *real* rights that bind everyone, in the same way that my title to a parcel of land binds *everyone* to respect my property—even if they do not have a contract with me. A contract, by contrast, binds *only* parties to the contract. It is like private law between the parties.[82] It does not bind third parties, i.e., those not in "privity" with the original parties.[83]

Thus, if the book purchaser B relates to third parties T the plot of the purchased novel, these third parties T are not bound, in general, by the original contractual obligation between A and B. If I learn how to adjust my car's carburetor to double its efficiency, or if I learn of a poem or movie plot someone else has written, why should I have to pretend that I am ignorant of these things, and refrain from acting on this knowledge? I have not obligated myself by contract to the creator. I do not deny that contractual obligations

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Patents and Copyrights Morally Justified?" pp. 821 n. 8, 851–55, 864; and Richard O. Hammer, "Intellectual Property Rights Viewed as Contracts," *Formulations* 3, no. 2 (Winter 1995–96).

[81]See, e.g., Kinsella, "A Theory of Contracts"; Rothbard, *The Ethics of Liberty*, chap. 19; Williamson M. Evers, "Toward a Reformulation of the Law of Contracts," *Journal of Libertarian Studies* 1, no. 1 (Winter 1977), pp. 3–13; and Randy E. Barnett, "A Consent Theory of Contract," *Columbia Law Review* 86 (1986), pp. 269–321.

[82]Under the international law meta-rule *pacta sunt servanda* (contracts are to be observed), contracts between sovereigns (states, in the international law context) create a "law of the agreement" between the parties. See Paul E. Comeaux and N. Stephan Kinsella, *Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk* (Dobbs Ferry, N.Y.: Oceana Publications, 1997), chaps. 2, 5.

[83]For a definition of "privity of contract," see *Black's Law Dictionary,* 6th ed. (St. Paul, Minn.: West Publishing, 1990), p. 1199. See also, in the IP context, Bouckaert, "What is Property?" pp. 795, 805.

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can be implicit or tacit, but there is not even an implicit contract in such situations.

Nor can it be said as a general matter that I have stolen or fraudulently acquired the information, as there are many legitimate ways for individuals to acquire information. Artistic works, by their very nature, typically are made public. Scientific discoveries and innovations likewise can become known beyond the parties to confidentiality agreements. And it certainly cannot be said that my use of my carburetor, or writing a novel using the same plot, physically interferes with the creator's use of his own tangible property. It does not even prevent the creator from using his own carburetor idea to improve his own car or others', or from using that plot.

So, my adjusting my carburetor is not a breach of contract; it is not theft; and it is not physical trespass on the inventor's tangible property. Twiddling my carburetor does not violate the inventor's rights. At most, my use of this idea will diminish its *value* to the inventor by hampering his ability to monopolistically exploit it. As we have seen, however, one cannot have a right to the value of one's property, but only in its physical integrity.[84]

Thus, the use of contract only gets us so far. A book publisher may be able to contractually obligate his purchasers to not copy his book, but he cannot prevent third parties from publishing and selling it, unless some contract prohibits this action.

Contract vs. Reserved Rights

Third parties, then, who are not parties to the contract and are not in privity with the contractual obligor and obligee, are not bound by the contractual relationship. For this reason, although an innovator can use contract to stop specified individuals from freely using his ideas, it is difficult to use standard contract law to prevent third parties from using ideas they glean from others. Perhaps sensing this problem, some quasi-IP advocates shift from a purely contractual approach to a "reservation of rights" approach in which property rights in tangible resources are seen as a divisible bundle of rights.

For example, under the standard bundle-of-rights view, a landowner can sell the mineral estate to an oil company while retaining all rights to the surface, except for an easement (servitude) granting

[84]Hoppe, *A Theory of Socialism and Capitalism*, pp. 139–41, 237 n. 17.

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passage to a neighbor and a life estate (usufruct) granting use of the surface estate to his mother. Drawing on the bundle-of-rights notion, the "reservation of rights" approach holds that a type of "private" IP can be privately generated by creatively "reserving rights" to *reproduce* tangible items sold to purchasers.

Rothbard, for example, argues that one can grant conditional "ownership" (of "knowledge") to another, while "retaining the ownership power to disseminate the knowledge of the invention." Or, Brown, the inventor of an improved mousetrap, can stamp it "copyright" and thereby sell the right to each mousetrap *except for* the right to reproduce it. Like the real rights accompanying statutory IP, such "reservations" allegedly bind everyone, not just those who have contracted with the original seller. Thus, third parties who become aware of, purchase, or otherwise come into possession of the restricted item also cannot reproduce it—*not* because they have entered into a contract with Brown, but because "no one can acquire a *greater* property title in something than has already been given away or sold." In other words, the third party acquires a tangible thing—a book or a mousetrap, say—but it is somehow "missing" the "right-to-copy" part of the bundle of rights that "normally" constitutes all rights to the thing. Or, the third party acquires "ownership" of information, from a person who did not own the information and, thus, was not entitled to transmit it to others.[85]

But surely something is amiss here. Suppose that A writes a novel and sells a first copy, BOOK_1, without restriction (i.e., without a reservation of rights) to B_1; and a second copy, BOOK_2, to B_2—but "reserving" the book's inherent "right to copy." The two books, BOOK_1 and BOOK_2, *appear* to third parties to be otherwise identical. Yet they are not: one is incomplete; the other somehow contains more mystical "rights-essence" within its covers. Suppose B_1 and B_2 leave these books on a park bench, where they are discovered by third party T. According to Rothbard, BOOK_2 is "missing" the "right to copy," much like an electronic toy that is sold "batteries not included." It is as if there is an invisible, mystical tendril of "reproduction-ownership" stretching from BOOK_2 back to its true owner A, wherever he may be. Thus, even if T finds and homesteads the abandoned BOOK_2, this book simply does not contain "within itself" the right to permit the owner to copy it. It is being continually siphoned away by a rights wormhole which connects the item to owner A. Thus, if T

[85]Rothbard, *The Ethics of Liberty*, p. 123.

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homesteads the book, he still homesteads no more than he acquires. *T* homesteads only a book without a right to copy "built in," and, thus, does not have the right to copy $BOOK_2$. The same is true for subsequent third parties who come to possess the book.

Is such a view really tenable? Can we conceive of property rights working this way? Even if we can, would it really achieve the desired result here—preventing third parties from using the protected ideas? It is difficult to maintain that rights can be reserved in this manner. One function of property rights, after all, is to prevent conflict and to put third parties *on notice* as to the property's boundaries. The borders of property must necessarily be objective and intersubjectively ascertainable; they must be *visible*. Only if borders are visible *can* they be respected and property rights serve their function of permitting conflict-avoidance. Only if these borders are both visible and objectively just (justifiable in discourse) can they be expected to be adopted and followed. But think of the two books, $BOOK_1$ and $BOOK_2$. How could one tell the difference between them? How could one see the rights-tendril connected to the latter but not to the former? How can third parties be expected to respect an amorphous, invisible, mystical, spooky, possibly unknown and unknowable property border?

The implications of such a view are troubling. Palmer writes:

> The separation and retention of the right to copy from the bundle of rights that we call property is problematic. Could one reserve the right, for example, to remember something? Suppose that I wrote a book and offered it to you to read, but I had retained one right: the right to remember it. Would I be justified in taking you to court if I could prove that you had remembered the name of the lead character in the book?[86]

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[86]Palmer, "Are Patents and Copyrights Morally Justified?" p. 853. Palmer also quotes the following illuminating passages.

Hegel argued: "The substance of an author's or an inventor's right cannot in the first instance be found in the supposition that when he disposes of a single copy of his work, he arbitrarily makes it a condition that the power to produce facsimiles as things, a power which thereupon passes into another's possession, should not become the property of the other but should remain his own. The first question is whether such a separation between ownership of the thing and the power to produce facsimiles which is given with the thing is compatible with the concept of property, or whether it does not cancel the complete and free ownership on which

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But third parties still pose a problem for this theory. Even if a seller of an object could somehow "reserve" certain use-rights with respect to the sold object, how does this prevent third parties from using *information* apparent from or conveyed in that object? Reserved rights proponents say *more* than that the immediate buyer B_1 is bound not to reproduce the book; for this result could be obtained by pointing to the implicit *contract* between seller A and buyer B_1. Let us consider a third party, T_1, who finds and reads the abandoned book, thus *learning* the information in it. Alternatively, consider third party T_2, who never has possession of or even sees the book; he merely learns of the information in the book from gossip, graffiti, unsolicited e-mail, and so forth. Neither T_1 nor T_2 has a contract with A, but both now possess certain knowledge. Even if the book somehow does not contain within it a "right to reproduce," how can this prevent T_1 and T_2 from using their own knowledge? And even if we say that T_1 is somehow "bound" by a contractual copyright notice printed on the book (an untenable view of contract), how is T_2 bound by any contract or reserved right?

Rothbard attempts to address this point as follows:

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there originally depends the option of the single producer of intellectual work to reserve to himself the power to reproduce, or to part with this power as a thing of value, or to attach no value to it at all and surrender it together with the single exemplar of his work." *Hegel's Philosophy of Right*, p. 55, quoted in Palmer, "Are Patents and Copyrights Morally Justified?" p. 853 n. 138.

And, as Kant noted: "Those who regard the publication of a book as the exercise of the rights of property in respect of a single copy—it may have come to the possessor as a [manuscript] of the author, or as a work printed by some prior publisher—and who yet would, by the reservation of certain rights, . . . go on to restrict the exercise of property rights, maintaining the illegality of reproduction—will never attain their end. For the rights of an author regarding his own thoughts remain to him notwithstanding the reprint; and as there cannot be a distinct permission given to the purchaser of a book for, and a limitation of, its use as property, how much less is a mere presumption sufficient for such a weight of obligation?" Immanuel Kant, "Was ist ein Buch?" in *Die Metaphysic die Sitten*, ed. W. Weischedel (Frankfurt a.M.: Suhrkamp Verlag, 1977), p. 581, translated and quoted in Palmer, "Are Patents and Copyrights Morally Justified?" p. 853 n. 138; for an alternative translation, see Immanuel Kant, *Essay Three: Of the Injustice of Counterfeiting Books*, trans. John Richardson, ed. and rev. Stephen Palmquist (Philopsychy Press, 1994).

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> A common objection runs as follows: all right, it would be criminal for *Green* [the buyer] to produce and sell the Brown mousetrap; but suppose that someone else, Black, who had not made a contract with Brown, happens to see Green's mousetrap and then goes ahead and produces and sells the replica? Why should *he* be prosecuted? The answer is that . . . no one can acquire a *greater* property title in something than has already been given away or sold. Green did not own the total property right in his mousetrap, in accordance with his contract with Brown—but only all rights *except* to sell . . . a replica. But therefore Black's title in the mousetrap, the ownership of the ideas in Black's head, can be no greater than Green's, and therefore he too would be a violator of Brown's property even though he himself had not made the actual contract.[87]

There are several problems with this reasoning. First of all, Black merely *sees* Green's mousetrap. He does not see or have access to ideas in Green's head. Nor does he need to have such access in order to duplicate evident features of the mousetrap.

Further, ideas in one's head are not "owned" any more than labor is owned. Only scarce resources are owned. By losing sight of scarcity as a necessary aspect of a homesteadable thing, and of the first occupancy homesteading rule as the way to own such things, Rothbard and others are sidetracked into the mistaken notion that ideas and labor can be owned. If we recognize that ideas cannot be owned (they are not scarce resources), that creation is neither necessary nor sufficient for ownership (first occupancy is), and that labor need not be "owned" in order to be a homesteader, then the trouble caused by these confused notions disappears.

If Black *somehow* comes into possession of the ideas implicit in an item which Brown invented (in Rothbard's example, he "happens to see" it), it is *irrelevant* that the mousetrap may not have had a "right to copy" built into it. For Black does not need such permission to use his own property as he sees fit. How does "happening to see" the mousetrap make Black a trespasser or violator of Brown's rights?

All action, including action which employs owned scarce means (property), involves the use of technical knowledge.[88] Some of this

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[87]Rothbard, *The Ethics of Liberty*, p. 123.

[88]Kinsella, "Knowledge, Calculation, Conflict, and Law"; Jörg Guido Hülsmann, "Knowledge, Judgment, and the Use of Property," *Review of Austrian Economics* 10, no. 1 (1997), p. 44.

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knowledge may be gained from things we see, including the property of others. We do not have to have a "right to copy" as part of a bundle of rights to have a right to impose a known pattern or form on an object we own. Rather, we have a right to do *anything at all* with and on our own property, provided *only* that we do not invade others' property borders. We must not lose sight of this crucial libertarian point. If I own a 100-acres of land, I can prance around naked on it, *not* because the land is imbued with some "right-to-prance-naked," but because I *own* the land and it does not (necessarily) violate the property rights of others for me to use my property in this fashion.

Similarly, I am entitled to do what I want with my own property —my car, my paper, my word processor—including improving my car's carburetor or using my ink to print words on my paper. That is, *unless* I have contractually obligated myself to someone else to restrict my actions with respect to my use of this knowledge. I do not have to first find in my property a right-to-use-in-a-certain-way, for *all* ways of using it, *except* those that cause invasions of others' property borders, are already encompassed within the general *right to use* my property. In libertarianism, we live by right, not permission. We do not need to find permission to take actions with our own property. Contrary to practice in totalitarian societies, all things that are not forbidden are permitted. The reservation-of-rights view would reverse this by assuming that every use of property is valid only if that particular use-right can be somehow found or located in the property.

Consider the following analogy. Farmer Jed discovers oil under his land. No one for miles around knows about the black gold. Jed plans to buy his neighbors' property for a song; they'll sell it cheap, too, since they don't know about the oil. In the middle of the night, his nosy neighbor Cooter, suspicious over Jed's recent good spirits, sneaks onto Jed's land and discovers the truth. The next morning, at Floyd's barbershop, Cooter spills his guts to Clem and the boys. One of them promptly runs to a pay phone and gives a tip to a reporter at the *Wall Street Journal* (who happens to be his nephew). Soon, it is common knowledge that there is oil in the vicinity. The neighbors now demand exorbitant prices for their land, thus spoiling Jed's plans.

Let us grant that Cooter can be prosecuted for trespass and harms flowing therefrom. The question is, can Jed's neighbors be prevented from acting on their knowledge? That is, may they be forced to

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somehow *pretend* that they do not know about the oil, and sell their land to Jed for what they "would have" sold it when in ignorance? Of course they may not be so forced. They own their land, and are entitled to use it as they see fit. Unlike tangible property, information is not ownable; it is not property. The possessor of a stolen watch may have to return it, but so long as the acquirer of knowledge does not obtain that knowledge illicitly or in violation of a contract, he is free to act upon it.

Note, however, that according to the reservation-of-rights view, the neighbors would not be permitted to act upon their knowledge because they obtained it ultimately from Cooter, a trespasser who had no "title" to that knowledge. Thus, they could not have obtained "greater title" to it than Cooter himself had. Note also that others, such as geological surveyors mapping oil deposits, cannot include this information in their maps. They must feign ignorance until given permission by Jed. This imposed ignorance correlates with the unnatural scarcity imposed by IP. There is clearly no warrant for the view that reserved rights can somehow prohibit third parties from using knowledge they acquire.

It is simply not legitimate to restrict the use to which an owner of property can put it unless that owner has contractually obligated himself or has otherwise acquired the information by a violation of the information-holder's rights. Talk of reserving the right to copy is merely a way to avoid the contractual notion that only parties to a contract are bound by it.[89]

Therefore, as a general matter, purchasers can be bound by contracts with sellers to not copy or even re-sell the thing. However, once third parties become aware of the ideas underlying the invention or literary work, their use of that knowledge does not, in general, violate any recognizable property rights of the seller.

Given this view of scarcity, property, and contract, let us examine the legitimacy of common forms of IP.

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[89]Of course, in anarcho-capitalism, it is difficult to predict what extensive contractual regimes, networks, and institutions will arise. Various enclaves or communities may well require their customers, patrons, or "citizens" to abide by certain IP-like rules. On anarcho-capitalism, see, e.g., Hans-Hermann Hoppe, "The Private Production of Defense," *Journal of Libertarian Studies* 14, no. 1 (Winter 1998–1999), pp. 27–52.

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Copyright and Patent

As should be apparent, copyright and patent seek to prevent the owners of tangible property—scarce resources—from using their own property as they see fit. For example, they are prohibited, under patent law, from practicing patented methods, using their own property, or from shaping their own property into patented devices, even if they independently invent the method or device. Under copyright law, third parties who have not contracted with the author are prevented from copying or profiting from the author's original work. Clearly, sellers of novel devices or literary works can contract with buyers to prevent these buyers from reproducing, or even re-selling, the item. These contractual webs can be elaborate; a novel writer can license his story to a movie studio on the condition that the studio require all movie theaters to require customers to agree not to reproduce the plot of the movie, and so on.

Yet, once third parties not bound by a contract acquire this information, they are free to use it as they see fit. The reserved-rights approach does not change this. Thus, it would probably be difficult to maintain anything similar to our present patent and copyright laws using contract alone.

Trade Secrets

Trade secrets are easier to justify than patent or copyright. Palmer argues that they "emerge" from common law-type rights, and are, thus, legitimate.[90] Trade secret law allows damages to be obtained for, or an injunction to be issued to prevent, acts of "misappropriation" of a trade secret. This can be applied against the person who has improperly acquired the trade secret or who divulges the secret contrary to a contractual obligation, and also against others who know that they are obtaining the secret from such a person.[91]

Suppose employee *A* of company *X* has access to *X*'s trade secrets, such as its secret formula for a soft drink. He is subject to an employment agreement obligating him to keep this formula secret. He then jumps to *X*'s competitor, *Y*. *Y* wants to use the formula it

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[90]Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," pp. 280, 292–93; and Palmer, "Are Patents and Copyrights Morally Justified?" pp. 854–55.

[91]UTSA, § 1; Halligan, "Restatement of the Third Law—Unfair Competition: A Brief Summary," § 40, comment d.

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learns from *A* to compete with *X*. Under current law, so long as the secret formula has not been made public, *X* can get a court order to stop *A* from revealing the secret to *Y*. If *A* has already revealed the secret to *Y*, *X* can also get an injunction to stop *Y* from using or publicizing the formula.

Clearly, the injunction and damages against *A* are proper because *A* is in violation of his contract with *X*. More questionable is the injunction against *Y*, because *Y* had no contract with *X*. In the context in which such situations usually arise, however, where the competitor *Y* wants the trade secret and *knows* the defecting employee is in breach of contract, it could be argued that the competitor *Y* is acting in conspiracy with or as an accomplice of employee *A* to violate the (contractual) rights of trade secret holder *X*. This is because *A* has not actually breached his trade secrecy agreement *until* he reveals trade secrets to *Y*. If *Y* actively solicits *A* to do this, then *Y* is an accomplice or co-conspirator in the violation of *X*'s rights. Thus, just as the driver of the getaway car in a bank robbery, or the mafia boss who orders an assassination, are properly held liable for acts of aggression committed by others with whom they conspire, third parties can, in narrowly defined cases, be prevented from using a trade secret obtained from the trade secret thief.[92]

Trademarks

Palmer also argues that trademark law is legitimate.[93] Suppose some Lachmannian changes the name on his failing hamburger chain from LachmannBurgers to RothbardBurgers, which is already the name of another hamburger chain. I, as a consumer, am hungry for a RothbardBurger. I see one of the fake RothbardBurger joints run by the stealthy Lachmannian, and I buy a burger. Under current law, Rothbard, the "owner" of the RothbardBurgers trademark, can prevent the Lachmannian from using the mark RothbardBurgers to sell burgers because it is "confusingly similar" to his own trademark. That is, it is likely to mislead consumers as to the true source of the

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[92]On responsibility for conduct of another or for conspiracy, see, e.g., Texas Penal Code, §§ 7.02 (Criminal Responsibility for Conduct of Another), and 15.02 (criminal conspiracy). For definitions of "abet," "accessory," "accomplice," "aid and abet," "concert," and "conspiracy," see *Black's Law Dictionary*.

[93]Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," p. 280.

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goods purchased. The law, then, gives a right to the trademark holder against the trademark infringer.

In my view, it is the *consumers* whose rights are violated, not the trademark holder's. In the foregoing example, I (the consumer) thought I was buying a RothbardBurger, but instead got a crummy LachmannBurger with its weird kaleidoscopic sauce. I should have a right to sue the Lachmannian for fraud and breach of contract (not to mention intentional infliction of emotional distress and misrepresentation of praxeological truths). However, it is difficult to see how this act of fraud, perpetrated by the Lachmannian on *me*, violates *Rothbard*'s rights. The Lachmannian's actions do not physically invade Rothbard's property. He does not even convince others to do this; at most, he may be said to convince third parties to take an action within their rights, namely, to buy a burger from the Lachmannian instead of Rothbard. Thus, it would appear that, under libertarianism, trademark law should give *consumers*, not trademark *users*, the right to sue trademark pirates.

Moreover, more novel extensions of trademark, such as rights against trademark dilution or against certain forms of cybersquatting, cannot be justified. Just as a trademark holder does not have a right to his mark, neither does he have a right against his mark's dilution. The law against cybersquatting is simply based on an economically ignorant opposition to "scalping" and arbitrage. There is, of course, nothing wrong with being the first to acquire a domain name and thereafter selling it to the highest bidder.

Conclusion

We see, then, that a system of property rights in "ideal objects" necessarily requires violation of other individual property rights, e.g., to use one's own tangible property as one sees fit.[94] Such a system requires a new homesteading rule which subverts the first-occupier rule. IP, at least in the form of patent and copyright, cannot be justified.

It is not surprising that IP attorneys, artists, and inventors often seem to take for granted the legitimacy of IP. However, those more concerned with liberty, truth, and rights should not take for granted

[94]See Palmer, "Intellectual Property: A Non-Posnerian Law and Economics Approach," p. 281; and Palmer, "Are Patents and Copyrights Morally Justified?" pp. 831, 862, 864–65.

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the institutionalized use of force used to enforce IP rights. Instead, we should re-assert the primacy of individual rights over our bodies and homesteaded scarce resources.

APPENDIX: SOME QUESTIONABLE EXAMPLES OF PATENTS AND COPYRIGHTS

Some exemplary U.S. patents:[95]

- "Christmas Tree Stand Watering System," U.S. Pat. No. 4,993,176, Feb. 19, 1991 (Christmas tree watering stand shaped like Santa Claus);
- "Initiation Apparatus," U.S. Pat. No. 819,814, May 8, 1906 ("harmless" way of initiating a candidate into a fraternity by shocking him with electrodes);
- "Method of Exercising a Cat," U.S. Pat. No. 5,443,036, Aug. 22, 1995 (shining a laser light onto the floor to fascinate a cat and cause it to chase the light);
- "Pat on the Back Apparatus," U.S. Pat. No. 4,608,967, Sep. 2, 1986 (apparatus with simulated human hand to pat the user on the back);
- "Hyper-Light-Speed Antenna," U.S. Pat. No. 6,025,810, Feb. 15, 2000 (poking hole in another "dimension" to transmit RF waves at faster-than-light speed, incidentally accelerating plant growth);
- "Force-Sensitive, Sound-Playing Condom," U.S. Pat. No. 5,163,447, Nov. 17, 1992 (self-explanatory; for example, it could play "Dixie");
- "Method and System for Placing a Purchase Order via a Communications Network," U.S. Pat. No. 5,960,411, Sep. 28, 1999 (Amazon.com's "one-click" method for purchasing an item on the world wide web by single mouse-click);

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[95]These and other patents may be retrieved at http://www.delphion.com, http://www.uspto.gov/patft/index.html, or http://www.patentgopher.com. See also "Wacky Patent of the Month," http://colitz.com/site/wacky.htm; IBM, "Gallery of Obscure Patents," http://www.patents.ibm.com/gallery; and Greg Aharonian, "Bustpatents," http://www.bustpatents.com.

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- "Financial Certificates, System and Process," U.S. Pat. No. 6,017,063, Jan. 25, 2000 (inflation-indexed gift certificate or mutual fund share);
- "Method and System for Measuring Leadership Effectiveness," U.S. Pat. No. 6,007,340, Dec. 28, 1999 (assigned to Electronic Data Systems Corporation);
- "Sanitary Appliance for Birds," U.S. Pat. No. 2,882,858, April 21, 1959 (bird diaper);
- "Religious Soap," U.S. Pat. No. 3,936,384, Feb. 3, 1976 (bar of soap with religious design on one side and prayer on the other); and
- "Method of Preserving the Dead," U.S. Pat. No. 748,284, Dec. 29, 1903 (preserving dead person's head in block of glass).

Copyright law, while it has not led to as many clearly absurd applications, has also been extended greatly by the courts. Originally intended to cover literary works, the concept has been stretched so that authored "works" include computer programs, and even machine language and object code, which is more analogous to a machine part, such as a cam, than to a literary work.[96]

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[96]*Final Report, National Commission on New Technological Uses (CONTU) of Copyright Works*, July 31, 1978 (Washington, D.C.: Library of Congress, 1979); *Apple Computer, Inc. v Franklin Computer Corporation*, 714 F2d 1240 (3d Cir 1983); *NEC Corp. and NEC Electronics, Inc. v Intel Corp.*, 1989 Copr.L.Dec. ¶ 26,379, 1989 WL 67434 (ND Cal 1989).

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TOWARD A LIBERTARIAN THEORY OF BLACKMAIL

Walter Block*

In order to apply the legal code of the libertarian political philosophy to the issue of blackmail, it is necessary to begin with a definition of terms. Murray Rothbard notes that this

> legal code, simply, would insist on the libertarian principle of no aggression against person or property, [and] define property rights in accordance with libertarian principle.[1]

Under this system, people would be free to do whatever they wished, without limits, except that they would have to respect everyone else's right to do the same. They could do this if and only if they refrained from initiating or threatening violence against another person or his property.

Blackmail is the request for money or other valuable consideration, coupled with an offer, typically, to refrain from exposing a secret which is embarrassing to the blackmailee. Since it is legal to request money, and it is also lawful to make offers, one would think that a complex act composed of both of these elements would also

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[1]Murray N. Rothbard, *For a New Liberty* (New York: Macmillan, 1978), p. 235. This libertarian legal code would be based on homesteading virgin land, and, thereafter, on voluntary commercial acts such as trade and gifts. See, on this, Hans-Hermann Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Boston: Kluwer Academic Publishers, 1993).

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pass muster under our system of jurisprudence. Such is not the case, however; blackmail is considered a crime.

More broadly, blackmail is the request or demand for money or other valuable consideration, coupled with *any* offer or threat, the carrying out of which involves no criminal behavior. For example, instead of offering to refrain from exposing a secret which is embarrassing to the blackmailee, one could offer to refrain from attempting to seduce the blackmailee's fiance.[2] Alternatively, one could threaten to seduce the fiance unless he were paid not to do so. Since neither seduction nor requesting or demanding money is a criminal act, we arrive again at the same paradox: if two acts are legal when engaged in separately, how can they become illegal when combined?

Whether in the broad or narrow interpretation, blackmail must be sharply distinguished from extortion, which it superficially resembles. In the latter case, there is the same request or demand for funds or other valuables. But now, instead of an accompanying threat to do, or offer to refrain from doing, something *legal*, the threat is to engage in criminal behavior. For example, the extortionist threatens to blow up your house or kill your children unless he is paid to refrain from doing so.

Perhaps the following depiction, which breaks blackmail and extortion into their basic components, will clarify the difference between them:

	Blackmail	Extortion
Demand	Money (legal)	Money (legal)[3]
Threat	To tell secret (legal)	To kill children (illegal)

[2]Leo Katz mentioned this example in "Blackmail and Other Forms of Arm-Twisting," *University of Pennsylvania Law Review* 141, no. 5 (May 1993), p. 1568.

[3]It would appear at first glance that a demand for money would contravene our criminal codes. But a moment's reflection will convince us that this would be irrational. For example, as a newspaper vendor, I could demand 50 cents in return for my product. As a worker, you could demand $10 per hour for your services.

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Now let us reformulate the depiction slightly, putting it into more common terms of exchange:

	Blackmail	Extortion
Request	Money (legal)	Money (legal)
Offer	To remain quiet (legal)	To refrain from killing children (illegal)[4]

Several commentators have considered this state of affairs, in which two legal "whites" combine to constitute a legal "black," a paradox.[5] Fletcher argues, to the contrary, "that blackmail is not an anomalous crime but rather a paradigm for understanding both criminal wrongdoing and punishment."[6]

Why? Fletcher asks: "Why should an innocent end (silence) coupled with a generally respectable means (monetary payment) constitute a crime?" He argues that "This supposed paradox . . . is not peculiar to blackmail." Why not? Because "many good acts are corrupted by doing them for a price."[7] This, on its face, is in sharp contrast with libertarianism, since paying for something is not *per se* invasive. Therefore, from this perspective, if it is legal to do *X*, it is also legal to pay for *X*; there could conceivably be moral "corruption" involved in paying for something, but there can be no legal defilement.[8]

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[4]It would appear that to refrain from killing another person's children is perfectly licit. Most of us "do" this every day of our lives, and are none the worse for it. But note that we are defining extortion as a contrary-to-fact conditional: the offer or threat amounts to extortion if, *were* it to be carried out, it would *then* constitute a criminal offense.

[5]See, e.g., James Lindgren, "Unraveling the Paradox of Blackmail," *Columbia Law Review* 84 (1984); also, Leo Katz and James Lindgren, "Instead of a Preface," *University of Pennsylvania Law Review* 141, no. 5 (May 1993).

[6]George P. Fletcher, "Blackmail: The Paradigmatic Case," *University of Pennsylvania Law Review* 141, no. 5 (May 1993), p. 1617.

[7]Fletcher, "Blackmail," p. 1617.

[8]Some acts *cannot* be carried out for a price. For example, one cannot purchase true friendship. But this is a logical "cannot," rather than a legal one. That is, if one were to purchase a relationship, the English language

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How does Fletcher defend this contention? He offers three examples. The first of which finds that:

> There is nothing wrong with government officials showing kindness or doing favors for their constituents, but doing them for a negotiated price becomes bribery.[9]

For purist libertarians, there shouldn't be any politicians in the first place: government itself, in the absence of a contract (constitution) signed unanimously, is invalid. Politicians themselves are the anomaly. Therefore, the question of their being bribed does not arise.[10]

In the more moderate version of this philosophy, there is, indeed, room for the state. Here, government has certain legitimate roles, typically limited to courts, armies, and police. Politicians and bureaucrats may indeed "do favors for their constituents," but these are severely truncated. They would be restricted to defending persons and property against invasion.[11] Certainly, no "favors" of the

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functions so as to logically preclude the possibility that it is a true friendship. Alternatively, a true friendship, by its very nature, could not have been purchased by either friend. But this is very different from the view expressed in the text.

[9]Fletcher, "Blackmail," p. 1617.

[10]On this, see Rothbard, *For a New Liberty*; Hoppe, *Economics and Ethics of Private Property*; Lysander Spooner, *No Treason* (1870; reprint, Larkspur, Colo.: Pine Tree Press, 1966); Bruce L. Benson, "Enforcement of Private Property Rights in Primitive Societies: Law Without Government," *The Journal of Libertarian Studies* 9, no. 1 (Winter 1989); Bruce L. Benson, "The Spontaneous Evolution of Commercial Law," *Southern Economic Journal* 55 (1989); Bruce L. Benson, *The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990); David Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism*, 2nd ed. (La Salle, Ill.: Open Court, 1989); Edward Stringham, "Market-Chosen Law," *Journal of Libertarian Studies* 14, no. 1 (Winter 1998–1999); Patrick Tinsely, "Private Police: A Note," *Journal of Libertarian Studies* 14, no. 1 (Winter 1998–1999).

[11]On this moderate version, see, e.g., Ayn Rand, *The Virtue of Selfishness* (New York: New American Library, 1962); Tibor Machan, "Law, Justice and Natural Rights," *Western Ontario Law Review* 14 (1975); Tibor Machan, *Individuals and Their Rights* (La Salle, Ill.: Open Court, 1989); John Hospers, *Libertarianism* (Los Angeles: Nash, 1971); David Boaz, *Libertarianism: A Primer* (New York: Free Press, 1997); and Charles Murray, *What It Means To Be A Libertarian* (New York: Broadway Books, 1997). In the more

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usual pork barrel or subsidy variety would be tolerated. Politicians would have far less to do than at present.

However, suppose the friendly neighborhood cop protected a citizen from a mugger, and then turned around and charged the citizen for this service. This would certainly be untoward, but would not at all indicate that otherwise good acts can be corrupted by money payments. The unlawful behavior here would be contract violation, not bribery. In any reasonable police arrangement, a "no tipping" policy would be strictly enforced, lest it set in train motivations which would undermine the whole operation.

Similar adaptations prevail in the non-political arena.[12] For instance, a disc jockey is hired to play records which in his expert opinion are the "best." If financial considerations from record companies play any part in his choices, the entire radio station will come under suspicion. Therefore, the firm is likely to contractually bar bribes for its disk jockeys. But suppose it did not. Presume, that is, that the radio station publicly announced,[13] perhaps because its salaries were being seriously reduced, that its disk jockeys would henceforth be free to accept bribes, and to choose records on this basis. The station would have to take its chances with its customers—listeners and advertisers—but, since nothing in this scenario is equivalent to the initiation of violence against person or property, no libertarian law would have been violated.

Of course, a private police firm might engage in this commercially risky practice as well. If so, this would be but further evidence of the fact that financial payments do not render invalid otherwise licit acts.

Now assume that a government were so constituted as to allow and encourage side payments to its civil servants. As long as this were open and above board, this practice, while certainly peculiar, would not be legally improper. This indicates that it is not the side payments themselves which render this practice improper, but rather its behind-closed-doors (e.g., fraudulent) nature.

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radical version of libertarianism, these and all other functions would be privatized; a competing defense industry composed of police, army, and court firms would play this role.

[12]Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, N.J.: Humanities Press, 1982), p. 130.

[13]The radio station in this example might make such a public announcement so that there could be no question of fraud.

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Fletcher's second case in point is that "Sex is often desirable and permissible by itself, but if done in exchange for money, the act becomes prostitution."[14]

The response here is simple. Prostitution should be legalized forthwith. It is a "victimless crime," and if there is no victim, then there is no crime at all.[15] In some political jurisdictions—rural Nevada, the Netherlands, etc.—it *is* legal already.[16]

Fletcher's third example is that

> Confessing to a crime may be praiseworthy in some circumstances, but if the police pay the suspect to confess, the confession will undoubtedly be labeled involuntary and inadmissible.[17]

This is a rather strange scenario. Ordinarily, our concern is with police torturing suspects into confessing, not paying them to do so. Were this all there were to it, however, it would be unobjectionable. I, the alleged (but innocent) perpetrator, am likely to respond, "I didn't really steal that TV. But if the cops pay me $1,000,000, hell, I'll confess to it." Mutual gains from trade, and all that.

But this isn't really all there is to it. The problem under these assumptions is that the real thief will get away; the police will no longer look for him, as they have me in custody, the "confessed"

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[14]Fletcher, "Blackmail," p. 1617.

[15]It is not a victimless crime in the sense that no one can rationally object to or be hurt by it. But the same can be said of practically anything. Suppose I open up a grocery store. No more innocent an occupation can be imagined. Are there any "victims"? Certainly: at the very least, the employers and employees of already extant and, thus, competing groceries. Just as in the cases of prostitution or drugs, some of these people may become despondent, and even kill themselves or others. Nonetheless, opening a grocery store, for all that, is still a victimless activity, for what we mean by a crime with victims is one in which initiatory violence is used against innocent people. Neither grocers nor prostitutes fit this particular bill.

[16]This does not mean that prostitution would be allowed everywhere. As long as restrictive covenants and other forms of market zoning are allowed, such activities will be confined to areas where they cause few negative externalities. See Bernard Siegan, "Non-Zoning in Houston," *Journal of Law and Economics* 13, no. 1 (April 1970); Bernard Siegan, *Land Use Without Zoning* (Lexington, Mass.: D.C. Heath, 1972).

[17]Fletcher, "Blackmail," p. 1617.

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robber. Thus, this devolves into our answer to the favor-giving politician: it is another example of contract violation. The reason we hire police is to catch criminals; if they "buy" convictions, they are violating their contract with us.

Fletcher's three examples having failed in their task, we conclude that the ordinary common sense insight remains standing, despite Fletcher's best anti-market efforts to undermine it: if an act is legal, doing it for a payment cannot render it criminal.

TEN CASES

Fletcher's method in the remainder of his article is to use ten legal cases as a vantage point from which to consider various theories of blackmail.[18] Let us follow in his footsteps with his ten cases:

1. Crime case: *D*[19] threatens, if not paid, to report *V*'s suspected crime to the local prosecutor.

2. Tort case: *V* rams his car into *D*'s. *D* threatens to sue if *V* does not compensate *D* for the resulting damage.

3. Hush money: *D* threatens to reveal a damaging truth, say a sexual peccadillo, about celebrity *V* unless the latter pays "hush money." The threat is supported by incriminating pictures.

4. Late employee: *D*, *V*'s employer, threatens to fire *V* if he does not get to work on time.

5. Lascivious employer: *D*, *V*'s employer, threatens to fire *V* unless he sleeps with her.

6. Baseball case: *D* offers to sell *V* a baseball autographed by Babe Ruth with knowledge that *V*'s child, who is dying, would receive solace from having the ball. *D* demands $6000 for the ball.

7. Dinner kiss: *D* says to *V*, "If you do not go to dinner with me, I will not kiss you." Alternatively, *D* says to *V*, "If you do go to dinner with me, I will kiss you."

8. Tattoo case: *D* tells his friends that unless they pay him money, he will have his entire body tattooed.

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[18]Fletcher's positions are taken from "Blackmail," pp. 1618–20.

[19]*D*, presumably, stands for defendant, or possible blackmailer, while *V* stands for victim. I have no problem with using *D* for defendant, but as I do not consider blackmail a crime, I cannot consider the person being blackmailed as a victim. Instead of that terminology, I use the more neutral "blackmailee."

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9. Political embarrassment: *V* is a black political candidate. *D* is a black activist with anti-white views, whose connections to *V* are an embarrassment to *V*. *D* goes to *V* and tells him that unless he is paid off, he will speak out and repeatedly declare his support for *V*, thereby sabotaging *V*'s electoral chances.

10. Paid silence: Same story as in 9, but *V* goes to *D* and offers him $20,000 to "lay low" until after the election.

Let us compare Fletcher's evaluation of these cases with my own. We must step carefully here, though. Fletcher divides them into two categories: the crime of "blackmail" and "no crime." I divide them into two other categories: the non-crime of "blackmail" and the crime of "extortion." If we were each to stick to our own categorizations, the scorecard would look like this:

	Fletcher	*Block*	*Agree?*
1. Crime	blackmail	blackmail	no
2. Tort	no crime	blackmail	yes
3. Hush money	blackmail	blackmail	no
4. Late employee	no crime	blackmail	yes
5. Lascivious employer	blackmail	blackmail	no
6. Baseball	no crime	blackmail	yes
7. Dinner kiss	no crime	blackmail	yes
8. Tattoo	no crime	blackmail	yes
9. Political embarr.	blackmail	blackmail	no
10. Paid silence	no crime	blackmail	yes

My reasoning, it will be remembered, is that if what *D* threatens or offers is (or rather, should be, under the libertarian code) *per se* legal, then we have the non-crime of blackmail. On the other hand, if what *D* threatens or offers is (or rather should be under the libertarian code) *per se* illegal, then we have the crime of extortion. For me, whether or not money changes hands is irrelevant. Let us now consider each of these cases in detail.

Case 1

Is it, or should it be, legal for *D* to report *V*'s suspected crime to the local prosecutor? In order to avoid a straw man, we assume the worst case scenario for the libertarian point of view. That is, we

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posit that *V* did not engage in the forbidden action, and *D* knows this. Under these circumstances, it should *still* not be illegal for *D* to exercise his free speech rights, because they do not constitute an invasion.[20] And, having threatened to say something he has every right to say, unless he is paid, this act must be considered licit blackmail, not illicit extortion.

How should we categorize the act of falsely accusing someone of a theft? The appropriate terminology would be "libel." This, in turn, is usually considered a crime, but not by libertarians. Rothbard explains:

> Smith has a property right to the ideas or opinions in his own head; he also has a property right to print anything he wants and disseminate it. He has a property right to *say* that Jones is a "thief" even if he knows it to be false, and to print and sell that statement.[21]

The usual argument against this line of reasoning is that if *D* falsely claims that *V* is a thief, he has ruined *D*'s reputation; the real robber, then, is *D*, for making such a statement. The problem here is that *V*'s reputation consists of the thoughts of many people about him, not his own about himself, and thus cannot be owned by anyone else, least of all the person to whom it refers, *V*. Therefore, *D*, in "taking away" *V*'s reputation, has not seized from *V* anything that *V* can legitimately own.[22]

But isn't it worse to make libelous statements to the police and courts? After all, they can lock you up, or, worse, impose the death penalty on the basis of such "free speech." On the contrary, in the

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[20]Does this mean that anything goes? That anyone may *say* anything he wishes at any time? No. Certain types of speech constitute invasions. For example, if I hold a gun on you and yell "Your money or your life!" this is a paradigm case of initiatory aggression, even apart from actually pulling the trigger. (If I am sufficiently larger and/or stronger than you, I will not even need a gun.) Similarly, if your son is at sea where he cannot be reached, and I tell you that I am holding him captive and ask for funds to secure his release, this, too, is an example of "mere" speech constituting a criminal border crossing.

[21]Rothbard, *The Ethics of Liberty*, p. 126.

[22]For a further elaboration of this point, including a demonstration that, in a seeming paradox, reputations would be *safer* in a libertarian world than they are now, see Walter Block, *Defending the Undefendable* (New York: Fox and Wilkes, 1976), pp. 59–62; and Rothbard, *The Ethics of Liberty*, pp. 126–27.

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libertarian world, each person is responsible for his own acts. If the police or courts foolishly trust the statement about *V* by *D*, it is *their* responsibility. They will have engaged in an unwarranted border crossing, and, when the truth gets out, *they* will have to pay the appropriate penalty.[23] This is *a forteriori* no worse than an incitement which leads to death or injury. Rothbard illuminates:

> Should it be illegal . . . to "incite to riot"? Suppose that Green exhorts a crowd: "Go! Burn! Loot! Kill!" and the mob proceeds to do just that, with Green having nothing further to do with these criminal activities. Since every man is free to adopt or not adopt any course of action he wishes, we cannot say that in some way Green *determined* the members of the mob to their criminal activities; we cannot make him, because of his exhortation, at all responsible for *their* crimes. "Inciting to riot," therefore, is a pure exercise of a man's right to speak without being thereby implicated in crime.[24]

The point is that if a man has a right to incite, he certainly has a right[25] to bear false witness to the police or courts—subject, of course, to not violating a contract with them. Even on a mere utilitarian basis, he is likely to do far less harm, for experts, as opposed to members of an unruly mob, will be taking his testimony.

Case 2

Should it be legal for *D* to threaten *V* with a lawsuit unless he pays for the damages to *D*'s car? Yes, it should always be legal for anyone to launch a lawsuit against anyone else. Therefore, to threaten to do so would constitute legitimate blackmail, not extortion. There is, of course, such a thing as malicious prosecution, where the plaintiff can be successfully sued for launching annoying lawsuits. But to bring suit is not *per se* a rights violation; therefore, threatening to do so should be legal. In England, the plaintiff who loses a lawsuit must pay the costs, as determined by the court, of the defendant. In the U.S., this is not usually the case. Under libertarianism, the courts would be able to decide such matters.

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[23]This is an unusual claim. Typically, officials of the justice system are protected from the error of their ways. This would not be so under libertarianism.

[24]Rothbard, *The Ethics of Liberty*, p. 80.

[25]Throughout this article, we are concerned only with legal rights, not moral rights.

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Case 3

Should it be legal to threaten to reveal an embarrassing secret unless one is paid not to do so? (Alternatively, should it be legal to remain silent about this secret for remuneration?) The answer from the libertarian perspective is a definite Yes, since publicizing this secret, e.g., gossiping about it, is itself legal. How can *threatening* to do something be criminal if actually *doing* it is not?

Case 4

Should it be legal for *D*, *V*'s employer, to fire *V* if he does not get to work on time? Of course. It is always legitimate to fire an employee *for any reason at all, at any time*, assuming that there is no long-run contract in force precluding this option. Since it is lawful to *do* this, it must be licit to *threaten* to do so.[26]

Case 5

Should it be legal to fire an employee who refuses to sleep with the boss? The same analysis applies to this as to the previous case. If the employer has a right to fire a worker for any reason, then this applies whether men of good will would likely support the reason (as in the "late employee" case) or not (as in the present one). Any attempt to show a relevant difference is doomed to failure. Fletcher attempts this by citing Feinberg to the effect that the lascivious employer is guilty of "exploitation." But one man's exploitation is another man's voluntarily-agreed-upon contract. Why is it necessarily more "exploitative" (whatever that weasel word means) to agree

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[26]Charles Baird, "American Union Law: Sources of Conflict," *Journal of Labor Research* (Summer 1990); Walter Block, "Labor Relations, Unions and Collective Bargaining: A Political Economic Analysis," *Journal of Social, Political, and Economic Studies* 16, no. 4 (Winter 1991); Bill Kauffman, "The Child Labor Amendment Debate of the 1920's; or, Catholics and Mugwumps and Farmers," *Journal of Libertarian Studies* 10, no. 2 (Fall 1992); Morgan O. Reynolds, "An Economic Analysis of the Norris–LaGuardia Act, the Wagner Act, and the Labor Representation Industry," *Journal of Libertarian Studies* 6, nos. 3–4 (Summer/Fall 1982); Morgan O. Reynolds, *Power and Privilege: Labor Unions in America* (New York: Manhattan Institute for Policy Research, 1984); Morgan O. Reynolds, *Making America Poorer: The Cost of Labor Law* (Washington, D.C.: Cato Institute, 1987); Barry W. Poulson, "Substantive Due Process and Labor Law," *Journal of Libertarian Studies* 6, nos. 3–4 (Summer/Fall 1982); Sylvester Petro, *The Labor Policy of the Free Society* (New York: Ronald Press, 1957).

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to sleep with the boss than to arrive at work on time? Surely, for some people, it will be *less* onerous to do the former than the latter, although such slothful types will likely be in the minority.[27]

There is simply no reason for the law to accept certain voluntary contracts between consenting adults (ones stipulating that the worker has to appear at the office on time), while rejecting others (those stipulating a dual job, such as cook and bottle washer, or, more controversially, prostitute and secretary).[28] If prostitution itself should be legal, then so should a job which combines it with any other profession, such as, say, nursing or teaching.[29]

Case 6

Should it be legal for *D* to sell *V* a baseball card for $6000 so that a dying boy can have solace? Fletcher categorizes this as noncriminal, as do I. In my view, since there is no physical invasion of person or property involved in the "threat" to withhold the card unless the seller is paid, it is a licit act. But what of our author? Why doesn't Fletcher adopt a point of view consistent with his analysis of the lascivious employer? It is morally obnoxious in the minds of most people to combine the jobs of secretary and prostitute, which is, presumably, the reason Fletcher called this a crime. But this applies also (equally? more so?) to "taking advantage" of a child on his deathbed.

Case 7

Should it be legal for *D* to offer a kiss to *V* as a reward (penalty?) for going to dinner with him? The "threat" here is that if *V* refuses the culinary invitation, the kiss will be withheld. This is just one of a vast number of "capitalist acts between consenting adults"

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[27]Joel Feinberg, *Harmless Wrongdoing: The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1988).

[28]Walter Block and Robert W. McGee, "Blackmail as a Victimless Crime," *Bracton Law Journal* 31 (1999).

[29]I personally regard such behavior as morally reprehensible, but that is an entirely different matter. See Walter Block, "Libertarianism vs. Libertinism," *Journal of Libertarian Studies* 11, no. 1 (1994). See also Walter Block and Roy Whitehead, "Sexual Harassment in the Workplace: A Property Rights Perspective," *University of Utah Journal of Law and Family Studies* (forthcoming), which makes a legal case in favor of such contracts.

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that people conduct every day.[30] Since it does not imply the initiation of aggression, the libertarian will have no trouble passing on this as legal. But Fletcher, who also regards this as "no crime," has some explaining to do.

Why is this any different from the case of the lascivious employer? If we alter the players a bit and change the act from a kiss to sexual intercourse, it would appear that we have the same example. Surely, these changes of degree are irrelevant to the principle of the matter. The majesty of the law should, presumably, take no notice of the difference, except perhaps for degree of punishment if the act is imposed by the man on the woman. If so, how does Fletcher take one side here and the other there?

Case 8

Fletcher and I both agree that people should be allowed to threaten their friends that they will tattoo themselves if not paid.

Cases 9 and 10

These are really the same example. In 9, the radical black activist seeks money from the black politician to stay out of the latter's campaign; in 10, the politician offers money to the radical black activist to stay away. For the libertarian, both are instances of blackmail, and should be deemed legal. A contract is a contract; in terms of legality, it matters not one whit who initiates it.

For Fletcher, matters are otherwise. He designates the blackmailer-initiated example as "blackmail," while he calls the blackmailee-initiated example as "no crime." Again, it is difficult to see how he can reconcile this conclusion with his own legal philosophy.

Let us now look at all ten cases as a whole. I regard each and every one as an instance of blackmail, since none of the ten threats, if carried out, would be (better yet, *should* be) illegal. None are extortionate, since no threat of killing, maiming, etc., if valuable considerations were not forthcoming, ever appeared. Fletcher disagrees on cases 1, 3, 5, and 9, but he agrees that it is irrelevant whether the demand is in terms of money, sexual favors, or other valuable considerations. Furthermore, we agree that there is no "principled distinction" between the threat to disclose unwelcome information

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[30]Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 163.

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(3. hush money) and firing a worker (5. lascivious employer). We disagree, however, on the issue of the threshold. The difference between a kiss and sexual intercourse is of no moment, I maintain. If these favors are attained through legitimate non-invasive means (no use or threat of force or fraud), *either* is permissible; if not, not. Libertarianism is black and white on this issue: either the threat is invasive or not. If so, it constitutes extortion; if not, blackmail.[31]

THREATS AND OFFERS

In this and the next few sections of his article, our author examines these ten cases through various types of eyeglasses. Fletcher is on strong ground when he refuses to buy into the notion that all threats should be outlawed, and all offers legitimized. He correctly points out that "not all threats . . . are criminal; for example, the threat to sue in the tort case (no. 2), is considered permissible. So too the threat in the tattoo case (no. 8)."[32] Further, one can never forget the Marlon Brando character from "The Godfather," making his victims "an *offer* they cannot refuse." With "offers" like these, who needs threats?

Thus, it is hard to accept his view that "An all too facile resolution of these cases is that they contain threats that *D* has the right to make."[33] An "offer" or threat to cut your throat unless you abide by my commands is illicit, since I have no right to cut your throat. An offer or threat to sue you unless you abide by my commands should be legal, since I *do* have a right to launch a lawsuit against you.

Moreover, Fletcher is on weak ground when he accepts the notion that "Coercion is immoral because it deprives the victim of an option she would have had, and this deprivation interferes with her autonomy, i.e., her freedom of action."[34] Coercion of this sort may

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[31]Libertarians, along with everyone else, are aware that there is a continuum between aggression and non-aggression. If I swing my fist to within one inch of your nose with "bad intentions," even though I have not hit you (yet), this is clearly an initiation of violence. On the other hand, if I shake my fist at you from one mile away, it is not. At what precise point does a (legally) meaningless gesture become a "clear and present danger"? This is a grey area for all philosophical viewpoints.

[32]Fletcher, "Blackmail," p. 1621.

[33]Fletcher, "Blackmail," p. 1621.

[34]Fletcher, "Blackmail," p. 1621.

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well be immoral,[35] but it certainly should not be illegal. If it were, Fletcher's theory would be wildly over-inclusive, as it would drag into its clutches most, if not all, competitive activity. For example, the successfully competing grocer will cost you profits, and eventually, perhaps, drive you into bankruptcy. If so, this would deprive you of an "option" you would otherwise have had, apart from his action, which will undoubtedly interfere with your "autonomy, i.e., (your) freedom of action." That is to say, you will have far fewer resources because of this grocer's "coercion."

Nor is his reliance on "the baseline of normalcy" at all convincing. For here, "we may regard proposed changes for the worse as threats."[36] But we have already seen that a new grocery store would comprise a change for the worse for you. Therefore, according to Fletcher, this would be a threat and, thus, presumably, outlawed. This is preposterous.

This leads Fletcher to another philosophical blunder. He says:

> Suppose that *D* sells sports memorabilia and the normal asking price for the ball autographed by Babe Ruth is $600. If *V* has an expectation and a right to buy at $600, then *D*'s setting the price ten times higher constitutes a threat to withhold the ball unless *V* pays the exploitative price. It is as though *D* threatened to take the ball away from *V* if *V* did not pay an additional $5400.[37]

As I am writing this, I am in the process of arranging a trip from Little Rock, Arkansas, to Rome, Italy, to give a speech there. I had expected the price to be about $650. I have just learned, much to my consternation, that the actual cost will be in the neighborhood of $1300, roughly double what I regard as normal. [38] In effect, I am *V*, and the airline is *D*. Did I have a "right" to buy at $650 merely because I had an "expectation" that this would be the price? According to Fletcher, I seemingly did. Therefore, the airline's "setting the price [twice as high] constitutes a threat to withhold the [ticket] unless I pay the exploitative price. It is as though [the airline] threatened to take the [ticket] away from [me] if I [or rather my host] did

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[35]Who knows, since this author has given us no criterion on the basis of which to judge?

[36]Fletcher, "Blackmail," p. 1622.

[37]Fletcher, "Blackmail," p. 1622 n.11.

[38]True, *I* don't have to pay it, but I *do* have to go through the embarrassment of telling my host in Italy, who had asked me to arrange travel from this end, that he will have to pay an additional $650.

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not pay an additional $650." One shudders at such a conclusion. For this is by no means limited to philosophical speculation. Fletcher is seriously putting forth a theory of *criminal* behavior. If he were to have his way, the airline executives would be accused of blackmail, and have to pay a fine or serve a term in the pokey.[39]

This reasoning also leads Fletcher to misconceived support of Nozick's fallacious "productive activity."[40] After Rothbard's utter evisceration of this concept, it is difficult to understand why anyone would still utilize it. Rothbard points out that Nozick

> concedes, for example, that his reason for outlawing blackmail would force him also to outlaw the following contract: Brown comes to Green, his next-door neighbor, with the following proposition: I intend to build such-and-such a pink building on my property (which Brown knows Green will detest). I *won't* build this building, however, if you pay me X amount of money. Nozick concedes that this, too, would have to be illegal in his schema, because Green would be paying Brown for not being worse off, and hence the contract would be "non-productive." In essence, Green would be better off if Brown dropped dead. It is difficult, however, for a libertarian to square such outlawry with any plausible theory of property rights. . . . In analogy with the blackmail example above, furthermore, Nozick concedes that it *would* be legal, in his schema, for Green, on finding out about Brown's projected pink building, to come to Brown and offer to pay him not to go ahead. But why would such an exchange *be* "productive" just because Green made the offer? What difference does it make *who* makes the offer in this situation? Wouldn't Green *still* be better off if Brown dropped dead? And again, following the analogy, *would* Nozick make it illegal for Brown to refuse Green's offer and *then* ask for more money? Why? Or, again, would Nozick make it illegal for Brown to subtly

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[39]I also have certain expectations about my wife, children, friends, employers, etc., which, not to put too fine a point on it, are not always fully satisfied. (In contrast, I am perfect, and always satisfy any expectations that anyone ever has of me. Thus, according to Fletcher, I, alone, would not be subject to the penalties accorded to blackmailers.) As for these other people, if they don't watch out, I'll sic Fletcher on them, and they will face jail time. But then again, maybe I had better not make this threat, for Fletcher might accuse *me* of criminal blackmail. Come to think of it, I hereby retract it.

[40]Fletcher, "Blackmail," p. 1622 n.12; Nozick, *Anarchy, State, and Utopia.*

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> let Green know about the projected pink building and then let nature take its course: say, by advertising in the paper about the building and sending Green the clipping? Couldn't this be taken as an act of courtesy? And why should merely *advertising* something be illegal? Clearly, Nozick's case becomes ever more flimsy as we consider the implications.[41]

Another difficulty with predicating the analysis on "the normal situation" is that doing so elevates the status quo into a legal litmus test. If, for example, in the hush money case (no. 3), it is normal for the information to be suppressed, then, according to Fletcher, this would be a case of criminal blackmail. However, he also concedes that "if the normal situation is that the information leaks out," then the opposite result obtains.[42] Come again?

But wait! Perhaps I am being unfair to Fletcher. After all, at the end of this section, he turns around and criticizes this very notion of normalcy, dismissing it as "insuperably ambiguous," and summarizes: "the distinction between threats and offers is not likely to get us very far."[43] This constitutes strong evidence that I am indeed misreading Fletcher. But I persevere in my error, if error it be: if Fletcher is not using something like the normal situation, or Nozick's horrendously misbegotten notion of "productive activity,"[44] then how is he able to determine that the "hush money" case (no. 3) is one of criminal blackmail? If gossip is the norm—and it is in certain circles—then this criterion would point in the diametrically opposed direction.

THIRD PARTY CHIPS

In this section,[45] Fletcher comments upon the work of Lindgren.[46] But he starts off on the wrong foot, stating that Lindgren's

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[41]Rothbard, *Ethics of Liberty*, pp. 241–42.

[42]Fletcher, "Blackmail," p. 1623.

[43]Fletcher, "Blackmail," p. 1623.

[44]Russell Hardin, in "Blackmailing for Mutual Good," *University of Pennsylvania Law Review* 141, no. 5 (May 1993), p. 1806, states: "Richard Posner says blackmail . . . has no social product and should therefore be criminalized. This is a very odd conclusion. Much of what I do has no social product (for instance, I consume, I waste time), but surely it should not be criminalized."

[45]Fletcher, "Blackmail," pp. 1623–26.

[46]Lindgren, "Unraveling the Paradox of Blackmail."

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"comprehensive study reviews the literature, [and] pans *all* competing theories."[47] Lindgren is not at all as comprehensive as Fletcher seems to think; it ignores a whole host of libertarian articles critical of the blackmail-as-paradox perspective, maintaining, instead, that there is no paradox, and that blackmail should be considered a legal (albeit not necessarily a moral) market activity.[48]

Fletcher, for the most part, is sympathetic to Lindgren, noting that the latter's theory applies most directly to what Katz calls "informational blackmail,"[49] e.g., cases 1 and 3, crime and hush money. Fletcher goes so far in helping Lindgren as to try to shoehorn the latter's theory so as to apply it to the lascivious employer (no. 5) and political embarrassment (no. 9) cases.

But then he lowers the boom. In his first critique, Fletcher argues that in both the political embarrassment and paid silence cases

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[47]Emphasis, and all material within brackets, is mine.

[48]See, for example, Walter Block, "The Blackmailer as Hero," *The Libertarian Forum* (December 1972); Block, *Defending the Undefendable*; Walter Block, "Trading Money for Silence," *University of Hawaii Law Review* 8, no. 1 (Spring 1986); Walter Block, "The Case for De-Criminalizing Blackmail: A Reply to Lindgren and Campbell," *Western State University Law Review* 24, no. 2 (Spring 1997); Walter Block, "A Libertarian Theory of Blackmail," *Irish Jurist* 33 (1998); Walter Block, "The Crime of Blackmail: A Libertarian Critique," *Criminal Justice Ethics* 18, no. 2 (Summer/Fall 1999); Walter Block, "The Legalization of Blackmail: A Reply to Professor Gordon," *Seton Hall Law Review* 30, no. 4 (2000), pp. 1182–223; Walter Block, "Blackmailing for Mutual Good: A Reply to Russell Hardin," *Vermont Law Review* 24 (Fall 1999); Walter Block and Robert W. McGee, "Blackmail from A to Z," *Mercer Law Review* 50, no. 2 (Winter 1999); Walter Block, "Blackmail and 'Economic' Analysis," *Thomas Jefferson Law Review* 21, no. 2 (October 1999); Walter Block and Gary Anderson, "Posner on Blackmail: A Critique," *New York Law School Law Journal* (forthcoming); Walter Block, N. Stephan Kinsella, and Hans-Hermann Hoppe, "The Second Paradox of Blackmail," *Business Ethics Quarterly* 10, no. 3 (July 2000); Walter Block, "Threats, Blackmail, Extortion, Robbery, and Other Bad Things," *University of Tulsa Law Journal* 35, no. 2 (Winter 2000); Walter Block, "Blackmail *is* Private Justice," *University of British Columbia Law Review* (forthcoming); Eric Mack, "In Defense of Blackmail," *Philosophical Studies* 41 (1982); Murray N. Rothbard, *Man, Economy, and State* (Auburn, Ala.: Ludwig von Mises Institute, 1993); Block and McGee, "Blackmail As a Victimless Crime"; and Rothbard, *Ethics of Liberty*.

[49]Katz, "Blackmail and Other Forms of Arm-Twisting," p. 1567.

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(no. 9, no. 10), "*D* plays with a chip that seems to belong to someone else." Yet, *V* "is not the victim of blackmail if he initiates the transaction." My "intuition" is different from Fletcher's and that of the "most people" he alludes to in this regard. Take the hush money case (no. 3). If *V* were to approach *D*, and plead with him to keep secret *V*'s marital infidelity for a fee, my reading of the man on the street is that he would say that this, too, is blackmail. Certainly, Rothbard's Green–Brown scenario comes out much the same no matter who takes the first step. Why should it matter who opens the negotiations when *V*, by stipulation, has a "gun" held over him in any case?

Moreover, there cannot be property rights in information.[50] If information is the chip, then anyone who knows the key fact legitimately owns it. If I see the potential blackmailee leaving a married woman's home at 3 a.m., to say that I do not own this information is to say that I do not own the evidence of my own eyes.

His second critique is a telling one against Lindgren. Here, Fletcher argues that in the baseball case (no. 6),

> She [the seller] drives a hard exploitative bargain, but one that is neither criminal blackmail nor any other form of crime. The windfall profits derive from her taking advantage of something that does not belong to her, namely, the child's and parent's consumer surplus in possessing the ball. She is bargaining with a chip that does not belong to her, and for Lindgren, that should be enough to render her demand criminal. Since by common agreement is it not criminal, there must be something awry in Lindgren's argument.[51]

There are only two difficulties here. The first, somewhat off the main point, asks how a commercial interaction—which is voluntary for both buyer and seller—can be "exploitative." Surely there would be consumer surplus on *both* sides, even at the higher price. If there were not, the two parties would not have agreed to consummate the transaction. Second, "chip ownership" is more "flexible" than Fletcher seems to think. It is always open to Lindgren to assert that the baseball seller really owns the child's and

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[50] Block, "The Case for De-Criminalizing Blackmail; also N. Stephan Kinsella, "Against Intellectual Property," *Journal of Libertarian Studies* 15, no. 2 (Spring 2001).

[51] Fletcher, "Blackmail," p. 1625.

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parent's consumer surplus. With such ambiguous terms as "chips," anyone may say anything he likes. This leads to the real problem: the slipperiness of the concept.[52]

Third, Fletcher criticizes Lindgren for utilizing "a notion of extra-legal moral rights." If Fletcher had gone on to state that these were a concoction, something created out of the whole cloth with no justification, he would have been on firm footing. After all, anyone can create rights *de novo*, and then brand as criminals anyone who violates them. For example, I hereby declare, as a matter of law, the "right" to be free of left-handed redheads. We can now hunt them down mercilessly, secure in the knowledge that we are upholding this new "right."

Instead, however, Fletcher *accepted* these Lindgren-created other-people's-chip "rights," and argued that even if they were valid, the criminal law does not consider them to be legal rights. This is legal positivism run amuck. Happily, the law has not yet entrenched Lindgren. For once, the criminal law is *correct* in not recognizing "chip rights." But, contrary-to-fact conditional, suppose it *did*, as Fletcher seemingly accepts. Wouldn't it then be proper to penalize those who played with others' chips?

Fletcher demurs because "We do not penalize cheating on exams, committing adultery with other people's wives or husbands, or even stealing numerous forms of intellectual property." But cheating on an exam is a form of fraud, and *shouldn't* we punish fraud? Why should stealing intellectual property occupy a different legal category than other types of property? We certainly throw embezzlers in jail. And, as for adultery, there certainly have been times when this was considered a crime. That this no longer obtains is more an effect of the governmental monopolization of the marriage contract than that the law should not punish crime. That is to say, were we to erect a wall between marriage and state of the sort that some advocate between church and state, it is the rare contract, probably, that would stipulate a jail sentence for adultery. Governmentally imposed marriage contracts do make adultery a crime, but this has become a dead-letter law. In any case, it cannot be used to make Fletcher's (contrary-to-fact) point against Lindgren.

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[52]See, e.g., Walter Block and David Gordon, "Extortion and the Exercise of Free Speech Rights: A Reply to Professors Posner, Epstein, Nozick, and Lindgren," *Loyola of Los Angeles Law Review* 19, no. 1 (November 1985).

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DOMINANCE AND SUBORDINATION

Having cleared the decks, so to speak, of "all" contending theories, Fletcher is now ready to regale us with the correct solution. It turns out that his is a variant of the Marxian critique of hierarchies based on dominance (bad) and subordination (victim status).

A key element of this insight is that the blackmailer can keep "coming back for more." This is illustrated in the difference between the crime (no. 1) and tort (no. 2) cases. According to Fletcher:

> If *V* pays *D* an amount necessary to settle the tort dispute between them, *D* must release his claim. He cannot thereafter come back to *V* and demand more. But if *V* pays *D* money to suppress a criminal investigation, *D* retains the option of coming back for more. . . . Living with that knowledge puts the victim of blackmail in a permanently subordinate position.[53]

A difficulty is that mere domination cannot necessarily be a crime. In the Marxist lexicon, the employer always dominates the employee; does that imply that the boss always blackmails the worker? One would suppose so, at least in Fletcher's Marxist world. In the feminist lexicon, the female is always subordinate to the male; does that imply that all women are always and ever being victimized by the blackmail of men? One can only suppose so, in Fletcher's feminist world. In the "black studies" lexicon, the black is always subordinate to the white; does that imply that all people of African extraction are always and ever being victimized by the blackmail of Caucasians? Again, one can only suppose so, in this particular worldview.

But this is only the tip of the iceberg. If *A* is more in love with *B* than *B* is with *A*, then *B* can get more from *A* than *A* can get from *B*. This *may*, conceivably, result in *B* blackmailing *A* (heck, it could also result in *B* extorting from *A*—almost anything is possible in these made-up scenarios), but *need* it do so, as Fletcher logically implies? Hardly.

Something like this domination–subordination relationship will occur, more generally, in *any* case where *X* wants what *Y* has more than *Y* wants what *X* has. Usually, a price change will alter this and, presumably, sweep away the "blackmail." For example, if the demand for apples is greater than the supply thereof, suppliers will "dominate" (e.g., criminally blackmail) demanders until the price

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[53]Fletcher, "Blackmail," p. 1623.

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rises and balances the two sides of the market, stopping this nefarious activity.

Having established this criterion, at least to his own satisfaction, Fletcher considers how it can shed light on his ten cases.

It would appear that dominance and subordination illuminate the hush money case (no. 3). The key seems to be that even after *V* pays off *D*, *V* will still never have a moment's peace, because *D* can always make new demands in the future. According to Fletcher,

> This is the essence of the blackmail—not in the transaction itself, but the relationship of dominance implicit in taking the first step of inducing the victim to pay money for her own protection.[54]

One minor point, to begin: Fletcher seems to resent the idea that people be forced to pay for their "own protection." But even under present circumstances, it is the citizens' tax money that is used in (very small) part for this purpose. Unfortunately, much of the proceeds earmarked for state police and courts are used not to protect the victims of crime, but rather to ensure procedural niceties to protect the "rights" of criminals.

Now for the major point: Fletcher appears to have inverted the usual time dimension of criminality. Traditionally, crimes take place in the *past* and are punished in the *future*. Here, there is an inversion: the blackmailer is guilty not for any action he has already taken, but for those he *might* take in the future. Fletcher worries that "Even if *D* says that she is surrendering the pictures and the negatives, there is no assurance that copies have not been made" and might not be brought to bear eventually.[55] Citing Altman, Fletcher bewails the fact that "there cannot be any guarantee that a first payment will not be followed by more demands."[56] What a way to run criminal law—on the basis of what people *might* do in the future. On this ground, we are *all* due for a spell in the pokey. For example, I *might* punch you in the nose next Tuesday. Shall I be incarcerated now for this crime? This would appear to be the logical implication of Fletcher's analysis.[57]

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[54]Fletcher, "Blackmail," p. 1627.

[55]Fletcher, "Blackmail," p. 1627.

[56]Scott Altman, "A Patchwork Theory of Blackmail," *University of Pennsylvania Law Review* 141, no. 5 (May 1993), p. 1648; Fletcher, "Blackmail," p. 1627.

[57]This is eerily reminiscent of the Coase–Posner–Demsetz "law-and-economics" approach which determines property rights not on the basis of the

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A slightly more sympathetic interpretation of Fletcher would find not that he advocates jailing people now for what they might do in the future, but jailing them *presently* for having an illicit "hold" over someone. For example, the blackmailer who has just been paid off still has a "hold" over the blackmailee. The former can always "come back for more."

But this, too, is over-inclusive. Many have a hold over or have something on others and are still free, and quite properly so. For example, parents have something on their young kids, in that they can always abandon them; later, adult kids have the same implicit threat hanging over their aging parents. To return to the Marxist view, there is an employer's sword of Damocles hanging over each worker: he can always be fired. In like manner, feminists and black studies theoreticians make similar claims vis-à-vis males and females, whites and blacks. The doctor with a good bedside manner (and a record of successful operations), the heroin seller, the husband who is nice to his wife (or mean to her, in the case of masochism), all set up dependencies, and thus have an implicit threat

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past, but predicates it upon speculations as to what people might do in the future. Specifically, it will tip the balance in favor of those whose future acts are expected to most increase economic wealth. See Ronald H. Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (October 1960); Harold Demsetz, "Ethics and Efficiency in Property Rights Systems," in *Time, Uncertainty, and Disequilibrium: Explorations of Austrian Themes*, ed. Mario Rizzo (Lexington, Mass.: D.C. Heath, 1979); and Richard A. Posner, *Economic Analysis of Law*, 3rd ed. (Boston: Little, Brown, 1986). For a critique, see Walter Block, "Coase and Demsetz on Private Property Rights," *Journal of Libertarian Studies* 1, no. 2 (Spring 1977); Walter Block, "Ethics, Efficiency, Coasian Property Rights, and Psychic Income: A Reply to Demsetz," *Review of Austrian Economics* 8, no. 2 (1995); Walter Block, "O.J.'s Defense: A *Reductio Ad Absurdum* of the Economics of Ronald Coase and Richard Posner," *European Journal of Law and Economics* 3 (1996); Gary North, *Tools of Dominion: The Case Laws of Exodus* (Tyler, Tex.: Institute for Christian Economics, 1990); Gary North, *The Coase Theorem* (Tyler, Tex.: Institute for Christian Economics, 1992); Roy E. Cordato, "Subjective Value, Time Passage, and the Economics of Harmful Effects," *Hamline Law Review* 12, no. 2, (1989); Roy E. Cordato, "Knowledge Problems and the Problem of Social Cost," *Journal of the History of Economic Thought* 14 (Fall 1992); Roy E. Cordato, *Welfare Economics and Externalities in an Open-Ended Universe: A Modern Austrian Perspective* (Boston: Kluwer Academic Publishers, 1992); Elisabeth Krecke, "Law and the Market Order: An Austrian Critique of the Economic Analysis of Law," *Commentaries on Law and Economics* 1 (1998).

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over, e.g., the sick patient, the addict, the wife. According to Fletcher, they would all be guilty of blackmail. This interpretation, if we accept it, will scarcely keep *any*[58] of us out of jail.

Discussing the tardy employee case (no. 4), Fletcher argues that "So long as *V* shows up on time, *D* can make no additional threat of dismissal." In contrast, in the lascivious employer case (no. 5), he argues that if "*V* sleeps with *D*, he places himself in her power. The initial submission establishes a relationship of dominance and subordination that encourages further sexual demands."[59]

This appears to be a distinction without a difference. Why, just because *V* sleeps with *D* once, is he (*sic!*) more beholden to do it again? And how does *V*, the tardy employee, escape the clutches of *D*, the boss, just because he comes to work on time? Where is the difference in principle? One can as easily envision contradictory cases in which the blackmailer from the tardy employee case (no. 4) escalates the threats (perhaps into a full-blown demand for sex or money), or where the boss in the lascivious employer case (no. 5) pulls back after one sexual escapade. Neither "victim" is totally bereft of defensive resources; both the "late employee" and the worker subjected to the boss's unwanted sexual overtures can complain to the president of the company, or to the corporate or governmental harassment officer. I can certainly imagine the scenario as depicted by Fletcher, but is it the only realistic one? That it *must* be so seems a weak foundation upon which to build a theory of crime.

The baseball case (no. 6), although I would hardly call it a troublesome case, comes reasonably close to fitting Fletcher's theory, but not even it fits perfectly. He maintains that "Once the parent purchases the baseball, the seller *D* can demand nothing further."[60] I have previously suggested that this is not true in the general case,

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[58]All people are either whites, males, employers, parents, spouses, friends, children, or members of other similarly "exploitative" groups.

[59]Fletcher, "Blackmail," p. 1627. Fletcher's political correctness is not merely annoying, it is a threat to clear communication. In this case, he posits that a female is blackmailing a male to attain sexual favors. This is so much the reverse of the usual situation that every time this case is mentioned, one has to stop and think, to make sure one understands it correctly. Yes, there is a recent movie predicated on Fletcher's premise, but this is clearly a rare man-bites-dog story.

[60]Fletcher, "Blackmail," p. 1627.

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for *anyone* can always demand *anything* of *any* victim in the *future*. However, at first glance it would appear that the parent does not put herself (*sic!*) in any *worse* position because of the purchase of the baseball. But, upon further reflection, even this is not true. For the "exploitative" baseball seller, thanks to this very sale, will now see a weakness in the buyer that was not apparent beforehand. Namely, this dying child is in a very precarious position, and the loving parents are willing to do whatever it takes to make his last few weeks enjoyable. Therefore, the exploitative blackmailing seller can perhaps interest them in more toys for their dying child, maybe a Michael Jordan sweatshirt this time around. The possibilities are endless, at least while the kid is still alive. Like a shark with the scent of blood in its nostrils, this seller now "has a hold over" the hapless parents, a hold which was not apparent but for the sale.[61]

Fletcher's theory further unravels when he considers the dinner kiss case (no. 7). He boldly asserts that "dominance requires something more than withholding a kiss."[62] Says who? In addition to rereading Marx, Fletcher ought to avail himself of some of the more outlandish writings of psychologists and psychiatrists, particularly of the "New Age" variety. Surely, the imaginative powers of a person like Fletcher are not beyond positing a scenario where a person commits suicide because of the lack of a kiss. If so, then the ability to offer or withhold this physical interaction would certainly put the "kisser" in a position of dominance over the "kissee."

Nor does Fletcher fare any better when it comes to the tattoo case (no. 8). He is unwise enough to assert that "no one can dominate someone else by asking for money to do or not to do that which is in one's recognized domain of freedom."[63] Here, Fletcher should make himself aware of the phenomenon of the "Jewish mother," an individual who recognizes no such domain of freedom, at least for her son. If a male Jew were to threaten his mother with total body tattoos, she would be putty in his hands. Surely, he could "dominate" her, to the extent that this could ever occur, given her secret weapon: guilt.

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[61]Let us not inquire too closely as to how great a hold the seller has over the parents, and whether this is of greater moment than the "hold" held over the head of the philanderer by the gossip. The impossibility of interpersonal comparisons of utility renders all such speculation invalid.

[62]Fletcher, "Blackmail," p. 1627.

[63]Fletcher, "Blackmail," pp. 1627–28.

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However, in the course of his disquisition on tattoos, Fletcher gives the entire game away. His "smoking gun" statement is:

> The [tattoo] case resembles the problem of the landowner who threatens to build a wall on his own property that will deprive his neighbor of light. The neighbor has no easement to interpose against the landowner, and if the latter thus demands payment to forgo building the wall, the demand is within the landowner's rights; *there is no blackmail in demanding payments to do or not to do that which one has a right to do.* For the neighbor to complain of subordination to the whims of the wall builder, he would have to have some legitimate interest that is put in jeopardy by the repeated demands for payment.[64]

About this, a few comments: first, this resembles nothing so much as the "spite fence" case, or Rothbard's flaying of Nozick for his "productive exchange" concept with the Green–Brown pink building example.[65] Evidently, in making this statement, or, rather, to the degree that he really accepts this, Fletcher has changed his mind on these matters. Second, and even more telling, Fletcher has conceded the entire libertarian case in favor of legalizing blackmail.

Consider again his canonical case of hush money (no. 3), in light of the italicized sentence in the previous quotation. It is the libertarian contention that *D* has the right to reveal damaging truths about a sexual peccadillo of the celebrity *V*. No one on the other side of this debate really denies this. States Katz:

> *If Busybody had actually revealed Philanderer's affairs*, or if he had threatened Philanderer with doing so but not mentioned the money, or if he had asked for the money but not mentioned what he was going to do if he didn't get it—if he had done any of these things, *he would not be guilty of any crime whatsoever*. Yet when he combines these various actions, a crime results—blackmail.[66]

Even Fletcher himself admits that there "is nothing wrong with the separate acts of keeping silent or requesting payment for services rendered."[67]

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[64]Fletcher, "Blackmail," p. 1628, emphasis and bracketed material added.

[65]Rothbard, *Ethics of Liberty*, pp. 240–42.

[66]Katz, "Blackmail and Other Forms of Arm-Twisting," p. 1567, emphasis added.

[67]Fletcher, "Blackmail," p. 1617. Of course, he takes this all back with his discussion of good acts being "corrupted by doing them for a price," but

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But if "there is no blackmail[68] in demanding payments to do or not to do that which one has a right to do," and people have a right to gossip, to remain silent, and to request or demand funds for services, and if silence is a service, then it follows ineluctably that people have a right to engage in blackmail.[69] And if this is true, it takes only the merest of logical deductions to reach the conclusion that this practice ought to be legalized. Once one agrees with Fletcher's "smoking gun," it is only a failure to follow through with the syllogism that leads to a conclusion other than the libertarian one.

Fletcher, however, does not see things this way. Instead, after taking this detour, he reverts back to his old patterns. He now tries to apply his dominance-and-subordination test to the political embarrassment and paid silence cases (nos. 9 and 10). But this criterion applies no matter who initiates the deal. That is, in *both* the political embarrassment (no. 9) and the paid silence (no. 10) cases, *D* can keep "coming back for more" money, and thus is "dominant" over the "subordinate" *V*; and yet, Fletcher characterizes the former as (criminal) blackmail and the latter as no crime. This seems unwarranted, given that his criterion operates equally in both cases. The politician is in a subordinate position whether he approaches the political activist or the activist approaches him.

PUNISHMENT AS THE NEGATION OF DOMINANCE

Having "now generated a coherent and convincing fit between the principle of dominance and these specific cases," Fletcher goes on to show that this principle "explain[s] not only why blackmail is undesirable but also why it is conventionally regarded as a crime."[70] This is because punishment, at the end of the day, can be fully justified neither on utilitarian grounds nor on Kantian ones. Instead, according to Fletcher,

> The failure of the state to come to the aid of victims, as expressed in a refusal to invoke the customary institutions of arrest, prosecution, and punishment, generates

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that is another matter. We can hardly expect logical consistency from those who argue in favor of criminalizing blackmail after making the concession quoted in the text.

[68]For Fletcher, this means there is no *criminality*.

[69]That is, that blackmail is a legitimate market transaction, not a crime.

[70]Fletcher, "Blackmail," p. 1628.

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> moral complicity in the aftermath of the crime. The state's failure to punish also reaffirms the relationship of dominance over the victim that the criminal has already established.[71]

In effect, then, all crimes are but further instances of Fletcher's dominance-and-subordination motif. It cannot be denied that this is a necessary condition for crime. One could hardly have a violation of legitimate law without someone dominating someone else, thus rendering them subordinate.[72] But this certainly isn't sufficient to declare that a crime has occurred. As we have seen, and as common sense so fully attests, life is full of non-criminal hierarchies in which dominators outrank subordinates. In the orchestra, the conductor dominates the musicians; in sports, the coach dominates the players; in academia, the professor dominates the students; in family life, parents dominate children; in work, employers dominate employees; in construction, the architect dominates the builders. Are we to throw our whole society into jail?

But this does not fully exhaust the difficulties with Fletcher's perspective. For one thing, the state need not be the only institution of capture and punishment.[73] For another, even assuming the legitimacy of (only) government punishment, still left open is the question of whether this should be restricted to such clear-cut crimes as murder and rape, or expanded to include blackmail (as distinct from extortion). Nothing adduced by Fletcher inclines us to the latter opinion. Fletcher continues at the same old lemonade stand, worrying that the blackmailer can keep coming back for more from the

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[71]Fletcher, "Blackmail," p. 1634.

[72]In a real puzzler, Fletcher, in "Blackmail," p. 1634, specifically rejects this claim: "It would be difficult to maintain that all crimes are characterized by this feature of dominance. We can say, however, that this relationship of power lies at the core of the criminal law. It is characteristic of the system as a whole." But if the essence of blackmail consists of dominance and subordination, and if blackmail is "the paradigmatic crime," this feature of dominance must be at least a necessary condition of crime. Even I am willing to admit that this is so; it is strange that Fletcher would not.

[73]For examples of private alternatives, see Rothbard, *For A New Liberty*; Hoppe, *Economics and Ethics of Private Property*; Spooner, *No Treason*; Benson, "Enforcement of Private Property Rights in Primitive Societies"; Benson, "The Spontaneous Evolution of Commercial Law"; Benson, *The Enterprise of Law*; Friedman, *The Machinery of Freedom*; Tinsley, "Private Police"; and Stringham, "Market-Chosen Law."

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victim, and thus "has a hold over" him in the future. He waxes eloquent about the fact that

> [r]ape victims have good reason to fear that the rapist will return, particularly if the rape occurred at home or the rapist otherwise knows the victim's address. Burglars and robbers pose the same threat.[74]

While this is a great concern to be sure, one would have thought it secondary to the *first and only* crime, the actual rape. The point here is that there was only one crime committed in these cases, the one that actually took place. The fears that this engenders about a repeat performance,[75] while important, are only peripheral. The main problem we have with the rapist or burglar is that he committed the crime. Even if, somehow, no fears ever arose about the future,[76] the rape or burglary itself would still not disappear. It is hard to avoid the conclusion that Fletcher overemphasizes the fears engendered by the crime, and underemphasizes the crime itself, because of his dominance-and-subordination theory.

OBJECTIONS

Here, reasonably enough, Fletcher considers objections to his thesis. Unfortunately for him, this section only worsens his difficulties. It emerges even more clearly how closely wedded he is to the concept of future fears of dominance, even at the expense of the actual (past) crime itself. For example, he admits that homicide does not fit his model, because the victim is now dead and, presumably, beyond any fears.

One would have thought, to the contrary, that homicide would have been the best example of the perpetrator dominating a subordinate victim. Here, the criminal goes so far as to actually annihilate his prey. Instead of focusing on this primordial fact, Fletcher gets lost in speculations about how much fear a murder will create in the minds of the "decedent's loved ones."[77] But suppose that the

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[74]Fletcher, "Blackmail," pp. 1634–35.

[75]Altman, in "A Patchwork Theory of Blackmail," pp. 1655–56, says "the criminal nature of making repeated demands does not explain why the first demand should be criminal . . . [and] we condemn and prohibit blackmail even when future demands are unlikely or impossible."

[76]Assume that the victim was psychologically secure, or that the world ended right after the crime took place, or that the criminal was killed.

[77]Fletcher, "Blackmail," p. 1635 n. 45.

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victim was a hermit, and that the murder was never discovered. Although it could not increase fears of future homicides, it would not change the reality of the crime. That this irrelevancy should change matters for Fletcher is further evidence that his thesis is highly problematic.

The second objection that Fletcher considers is irrelevant to present concerns. It is clear that punishment would indeed "counteract the criminal's dominance over the victim."[78]

The third considered objection is of interest in that we have made it ourselves: that dominance is an insufficient account of the criminality of blackmail, since dominance may be justified, e.g., as in the case of voluntary hierarchy. Unfortunately, Fletcher does nothing to deflect this charge, instead contenting himself with reiterating the importance of the "*ensuing* relationship between *D* and *V*" and the "aftermath" of the crime,[79] all but ignoring the crime itself.

Last, Fletcher deals with this challenge: why not "wait for the second demand to ascertain whether the blackmailer intends to exercise his power"?[80] He rejects this on the ground that "the relationship of dominance and subordination comes into being as a result of the victim's making the first payment or engaging in the first coerced act of submission." Yes, indeed, that is exactly how he has defined the concept, as a "state of anticipation." But this is merely to reiterate his own position, not to seriously answer the charge that it is surely illicit to hold people guilty of a crime they *might* commit in the *future*.

Yes, as Fletcher asserts, "the existence of criminal sanctions give [the blackmailee] the possibility of asserting a counter threat of going to the police."[81] But this option would *also* obtain were we to legalize blackmail. In this case, the presumption is that a legally binding blackmail contract, stipulating the *entire* amount of the payment, would be signed. If the blackmailer demanded more, he would then be guilty of contract violation.[82]

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[78]Fletcher, "Blackmail," p. 1635.

[79]Fletcher, "Blackmail," p. 1637.

[80]Fletcher, "Blackmail," pp. 1637–38.

[81]Fletcher, "Blackmail," p. 1638.

[82]Of course, Fletcher might argue that if the blackmailee availed himself of this opportunity, his secret would likely come out. True. But the same applies to the case in which blackmail is illegal, and the blackmailee seeks police help.

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Thus, if Fletcher is concerned with arming the blackmailee with a weapon, he need not stick to his own viewpoint. He could instead embrace the libertarian position of criminalizing only uninvited border crossings of invasions.

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THE RISE AND FALL OF JURY NULLIFICATION

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Nay, all the ordinary power is rather the people's, who determine all controversies themselves by juries of twelve men. And hence it is that when a malefactor is asked at his arraignment, "How will you be tried?" he answers always, according to law and custom, "By God and my country; not by God and the king, or the king's deputy."
— John Milton

The United States Constitution guarantees the right to trial by jury in both civil and criminal cases.[1] This article will discuss the history of trial by jury as an aid to revealing what the framers and ratifiers of the Constitution meant when they guaranteed that right. In the process, it will also address the following questions:

1. Did the Constitution give juries the right to judge the law as well as the facts?
2. If so, to what extent is this right still recognized?
3. What is the constitutional basis of judicial decisions nullifying that right?
4. Why has the right been denied or limited?
5. What are the ramifications for the future of jury trials?

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[1]U.S. Constitution, art. 3, amend. 6, and amend. 7.

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Long after the Constitution was ratified, the courts declared that juries do not have the right to judge the law. We will examine those cases and their many permutations to show that the battles raging today over jury nullification are eerily similar to those which raged in England long ago.

Nullification may seem like a dead letter of historical interest only. However, the term "jury nullification" appears in many state and federal cases that are only recently decided. Even though mainstream jurisprudence has often condemned the doctrine, it is impossible to completely obliterate the doctrine and practice of jury nullification without completely eliminating the jury system itself. In many ways, that appears to be exactly where we are headed. In response to a grassroots jury nullification movement,[2] courts and prosecutors are becoming increasingly aggressive in combating jury nullifiers. Their concerns are not imaginary; the traditional five percent rate of hung juries has increased to fifteen or twenty percent in some locales, according to one report.[3]

TRIAL BY JURY IN ENGLAND

Trial by jury was the norm well before the U.S. Constitution was ratified in 1788. Colonial legal practice was modeled on English law, where jury trials had been in use since the thirteenth century. Initially, jurors were subject to legal action, fine, torture, and imprisonment if they brought in a verdict which the court thought contrary to law. Jurors were originally chosen from the ranks of persons who had some degree of knowledge about the issue in dispute. In civil cases, as "witnesses," they were subject to being punished for perjury, known as "attaint." In criminal cases, the Star Chamber could punish them for bringing a "false verdict." In the case of Sir Nicholas Throckmorton, tried for treason in 1554, the jury acquitted. For their service, they were imprisoned by the Star Chamber for six months.[4]

By the sixteenth century, however, juries had virtually unlimited discretion in reaching a verdict:

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[2]This grassroots movement is spearheaded by the Fully Informed Jury Association (FIJA), which sponsors a proposed Constitutional amendment called the Fully Informed Jury Amendment.

[3]J. Biskupic, "In Jury Rooms, A Form of Civil Protest Grows," *Washington Post* (Feb. 8, 1999), p. A01.

[4]Leonard W. Levy, *The Palladium of Justice: Origins of Trial by Jury* (Chicago: Ivan R. Dee, 1999), pp. 47–48.

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> [J]urors were responsible only to their own consciences. They were completely free to return a verdict of their pleasure in accordance with what they thought right. The evidence was not binding upon them; the judge's charge was not binding; nothing was. The law did not concern itself with the question of how they reached their verdict . . . . If a jury, moved by whim, mercy, sympathy, or pigheadedness, refused to convict against all law and evidence, the prisoner was freed, and that was that.[5]

Jury discretion was given judicial protection in *Bushell's Case*.[6] Edward Bushell had served on a jury in a case in which William Penn and William Mead were charged with practicing the Quaker religion. At the trial, the judges demanded that the jury find the defendants guilty if the jury found that the defendants had merely taken part in a Quaker meeting, apparently an illegal act. There was no real dispute that Penn and Mead had engaged in such behavior, and the court instructed the jury that the charge had been proved.[7] The jury withstood several days of badgering from the court, and ultimately refused to return a verdict of guilty. Bushell, their leader, was fined and imprisoned. He filed for *habeas corpus* relief, and was released by decision of the Chief Judge of England. Legal historian Leonard W. Levy explained the ruling:

> Allowing a court to imprison a juror for contempt on the ground that he had voted for an acquittal against the court's instructions on the law of the case subverted the functions of the jury. Indeed, the jury became a useless institution . . . if the judge controlled its understanding of the meaning of the law, which it was obligated to decide for itself. The jury could discharge its functions . . . only if it was exempt from the judge's power to fine and jail its members. By such reasoning, the King's Bench emancipated juries, allowing them ever after to return verdicts based on their grasp of the law as well as of the facts.[8]

TRIAL BY JURY IN THE COLONIES

The early colonists considered themselves Englishmen protected by the common law of England. Sixty-five years after *Bushell's*

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[5]Levy, *The Palladium of Justice*, pp. 45–46.

[6]125 Eng Rep 1006, 1013 [PC 1670]

[7]Levy, *The Palladium of Justice*, p. 59.

[8]Levy, *The Palladium of Justice*, pp. 61–62.

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Case liberated juries in England, colonists continued to assert the rights of jurors to reach a verdict against the direction of court. When Peter Zenger, a New York printer, was charged with criminal libel for criticizing the royal governor, Zenger wished to argue at his trial that his remarks were true. The court instructed the jury that truth was no defense. Defense counsel Andrew Hamilton, however, urged the jury to reach their own conclusions about this legal issue. They did so, acquitted Zenger, and struck a blow for free speech that was critical to the struggle for independence a few decades later.[9]

To understand the plausibility of the argument that the ratifiers of the Constitution held an expansive view of the rights of trial jurors, it is necessary only to examine the context of the enactment of the Constitution and Bill of Rights. The colonists were heavily influenced by a series of pamphlets known as *Cato's Letters*, which circulated throughout the colonies in the decades preceding the Revolution. The political philosophy of the colonists can be glimpsed in the following excerpts from *Cato's Letters*:

> All men are born free; Liberty is a gift which they receive from God himself; nor can they alienate the same by consent, though possibly they may forfeit it by crimes. . . . The right of the magistrate arises only from the right of private men to defend themselves, to repel injuries, and to punish those who commit them: that right being conveyed by the society to their public representative, he can execute the same no further than the benefit and security of that society requires he should. When he exceeds his commission, his acts are as extrajudicial as are those of any private officer usurping an unlawful authority; that is, they are void; and every man is answerable for the wrong which he does. A power to do good can never become a warrant for doing evil.[10]
>
> Only the checks put upon magistrates make nations free; and only the want of such checks makes them slaves.

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[9]Todd Barnet, "New York Considers Jury Nullification: Informing the Jury of its Common Law Right to Decide Both Facts and Law," *New York State Bar Journal* 65 (1993), p. 44.

[10]John Trenchard and Thomas Gordon, *Cato's Letters,* in *The English Libertarian Heritage*, ed. D.L. Jacobson (Indianapolis, Ind.: Bobbs-Merrill, 1965), pp. 108–9. See also Bernard Bailyn, *The Origins of American Politics* (New York: Random House, 1969), pp. 35–44, 54; and Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass.: Harvard University Press, 1967), pp. 35–37, 43–45.

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> They are free, where their magistrates are confined within certain bounds set them by the people. . . . And they are slaves, where the magistrates choose their own rules, and follow their lust and humours . . . those nations only who bridle their governors do not wear chains.[11]

These passages can be read to sanction the right of juries to nullify actions of judges, prosecutors, or even legislatures which exceed their "commissions."

Suspicious of government power, even the power of republican government, the citizenry would eventually insist on the Second Amendment, which guaranteed that "the right of the people to keep and bear arms shall not be infringed." The right to bear arms and the right to trial by jury have each been described as "the palladium of liberty." The Second Amendment is widely misunderstood, and has been given a self-serving, *post hoc* interpretation by judges, who have said that while the amendment states that "the right of the people to keep and bear arms, shall not be infringed," it really means that the right of the people to keep and bear arms *shall* be infringed.

In reality, the purpose of the right to bear arms was to allow citizens to defend themselves against governmental tyranny. Madison stated this explicitly in Federalist No. 46:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the State governments, *with the people on their side*, would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth part of the number able to bear arms. This proportion would not yield, in the United States, an army of more than twenty-five or thirty thousand men. To these would be opposed *a militia amounting to near half a million of citizens with arms in their hands*, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against

[11]Trenchard and Gordon, *Cato's Letters*, pp. 256–57.

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> the British arms, will be most inclined to deny the possibility of it.[12]

Refuting in one sentence the prevailing myth that the Second Amendment did not create a personal right to bear arms, Madison goes on to note "the advantage of being armed, which the Americans possess over the people of almost every other nation."

Given the fact that the framers were so suspicious of the federal government that they anticipated the people having to fight a shooting war against it, it is easy to accept the notion that the framers gave jurors substantial decision-making power. After all, the colonists had been warned by "Cato":

> Alas! Power encroaches daily upon Liberty, with a success too evident; and the balance between them is almost lost. Tyranny has engrossed almost the whole earth, and striking at mankind root and branch, makes the world a slaughterhouse; and will certainly go on to destroy, till it is either destroyed itself, or, which is most likely, has left nothing else to destroy.[13]

The key concept in understanding the political thought of the founders was popular sovereignty. The founders were *republicans*. They held a view of government, championed by John Locke, Algernon Sidney, Richard Overton,[14] and "Cato," founded on the idea that individuals had natural rights, including the natural right of self-defense. The government, in this view, was the agent of the individual; its purpose was to secure the individual's inalienable natural rights to life, liberty, and property—*not* to instill virtue, redistribute wealth, stimulate the economy, or protect people from themselves. The government had strictly limited powers—only those delegated to it by the people. Finally, and most critically, if those were exceeded or abused, they were subject to revocation by the people. The ultimate right to rule— which is inalienable—resides with the people. Thomas Jefferson was merely expressing the common view of the subject when he wrote the *Declaration of Independence*:

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[12]James Madison, *The Federalist Papers*, no. 46, ed. Jacob E. Cohen (Middletown, Conn.: Wesleyan University Press, 1961), p. 321, emphasis mine.

[13]Trenchard and Gordon, *Cato's Letters*, p. 196.

[14]For a discussion of Richard Overton and the Levelers, see Peter Kurrild-Klitgaard, "Self-Ownership and Consent: The Contractarian Liberalism of Richard Overton," *Journal of Libertarian Studies* 15, no. 1 (Fall 2000), pp. 43–96.

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> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

It is no accident that one of the causes of revolution listed in the Declaration was the King's "history of repeated injuries and usurpations," including "depriving us in many cases, of the benefits of Trial by Jury." The right to bear arms, the right of juries to nullify the law, and the right of revolution all have the same root: the inalienable right of the people to control the government when they believe it has become destructive of their liberties. It is no surprise to learn that Jefferson championed all three rights explicitly.

The Ninth and Tenth Amendments also express republican philosophy:

> IX. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
>
> X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Naturally, these amendments have been cited as a possible source for the right of jury nullification.[15] However, modern judges ask not if the Ninth and Tenth Amendments reserve a right to the people, but, contrary to these amendments, they ask if the Constitution "enumerated" such a right at all.[16]

THE CONSTITUTIONAL RIGHT TO TRIAL BY JURY

What the Constitution meant by the right to trial by jury may easily be seen in the context of what trial by jury meant immediately before the Constitution was ratified. John Adams, our second president, and before that chief justice of Massachusetts, wrote in 1771:

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[15]Barnet, "New York Considers Jury Nullification," p. 44 n. 11.

[16]See *Hawaii v Hatori,* Court of Appeals of Hawaii, Nov. 17, 1999.

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> Juries are taken, by lot or by suffrage, from the mass of the people, and no man can be condemned of life or limb or property or reputation without the concurrence of the voice of the people. . . . Whenever a general verdict is found, it assuredly determines both the fact and the law. It was never yet disputed or doubted that a general verdict, given under the direction of the court in point of law, was a legal determination of the issue. Therefore, the jury have a power of deciding an issue upon a general verdict. And, if they have, is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment, and conscience? . . . Should the melancholy case arise that the judges should give their opinions to the jury against . . . fundamental principles, is a juror obliged to give his verdict generally, according to this direction, or even to find the fact specially, and submit the law to the court? Every man, of any feeling or conscience, will answer, "No." It is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.[17]

Theophilus Parsons, also a chief justice of Massachusetts, wrote in 1788:

> The people themselves have it in their power effectually to resist usurpation, without being driven to an appeal to arms.[18] An act of usurpation is not obligatory; it is not law; and any man may be justified in his resistance. Let him be considered as a criminal by the general government; yet only his fellow-citizens can convict him. They are his jury, and, if they pronounce him innocent, not all the powers of congress can hurt him; and innocent they certainly will pronounce him if the supposed law he resisted was an act of usurpation.[19]

Thomas Jefferson, in his *Notes on the State of Virginia*, written between 1781 and 1782, described the division of labor between juries and judges:

> These magistrates have jurisdiction both criminal and civil. If the question before them be a question of law

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[17]John Adams, *The Works of John Adams, Second President of the United States*, quoted in *Sparf v United States*, 156 US 51, 143–44.

[18]Note that Parsons puts both the right to trial by jury and the right to bear arms in the category of means of resisting usurpation.

[19]Quoted in *Sparf v United States*, p. 144.

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> only, they decide on it themselves: but if it be of fact, or of fact and law combined, it must be referred to a jury. In the latter case, of a combination of law and fact, it is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertakes to decide both law and fact. If they be mistaken, a decision against right, which is casual only, is less dangerous to the state, and less afflicting to the loser, than one which makes part of a regular and uniform system. In truth, it is better to toss up cross and pile[20] in a cause, than to refer it to a judge whose mind is warped by any motive whatever, in that particular case. But the common sense of twelve honest men gives still a better chance of just decision, than the hazard of cross and pile.[21]

Initially, the Constitution protected only the right to trial by jury in criminal cases. However, contrary to the popular image of universal approval, the document, when it was presented to the public in 1787, engendered great opposition from what we now call the Anti-Federalists. In addition to their belief that life under the Articles of Confederation was not all that bad, the Anti-Federalists' main objection was that the new Constitution lacked sufficient guarantees of individual rights. What would prevent this powerful new government from turning tyrannical, an event which Benjamin Franklin predicted on the floor of the Constitutional Convention?

A bitter struggle between the Federalists and Anti-Federalists ensued in various state conventions called to consider the new Constitution. The Constitution was barely ratified in several states; the vote in New York, for instance, was 30 to 27 in favor. Many other states insisted that the price of their ratification was that a Bill of Rights be added. The Bill of Rights became the price the Federalists had to pay to get the Constitution approved. Thus, the Bill of Rights is best understood as the practical expression of the philosophy of individual natural rights that dominated American political thought in the eighteenth century. The right to trial by jury owes much to the Anti-Federalists:

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[20]"Cross and pile" is game of chance.

[21]Thomas Jefferson, *Notes on the State of Virginia*, ed. William Peden (Chapel Hill: University of North Carolina Press, 1955), p. 130.

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> The Anti-Federalists insisted that the Constitution should explicitly recognize the traditional procedural rights: to be safe from general search and seizure, to be indicted by grand jury, to trial by jury, to confront witnesses, and to be protected against cruel and unusual punishments. The most important of these was the trial by jury, and one of the most widely uttered objections against the Constitution was that it did not provide for (and thus effectively abolished) trial by jury in civil cases.[22]

After the Constitution was ratified, most judges and lawyers continued to hold that juries had the power to judge the law. In 1794, the first Chief Judge, John Jay, instructed a jury in a civil case as follows:

> [O]n questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be recognized that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, we have no doubt, you [the jury] will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts it is, on the other hand, presumable, that the courts are the best judge of the law. But still both objects are lawfully, within your power of decision.[23]

Alexander Hamilton, one of the great lawyers of that era, argued:

> [I]n the general system of powers in our system of jurisprudence, the cognizance of law belongs to the court, of fact to the jury; that as often as they are not blended, the power of the court is absolute and exclusive. . . . That in criminal cases, the law and fact being always blended, the jury, for reasons of a political and peculiar nature . . . is entrusted with the power of deciding both law and fact.[24]

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[22]Herbert J. Storing, *What the Anti-Federalists Were For* (Chicago: University of Chicago Press, 1981), p. 64.

[23]*State v Brialsford,* 3 Dall. 1, 4.

[24]Alexander Hamilton, *The Works of Alexander Hamilton*, quoted in *Sparf v United States*, 156 US 51, 175.

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THE HIGH-WATER MARK OF JURY NULLIFICATION: 1852

In the nineteenth century, Lysander Spooner was the foremost exponent of the right of juries to decide issues of law. Spooner, who wrote *An Essay on Trial by Jury* in 1852, is one of the most interesting characters in the history of American law. He was a lawyer, constitutional scholar, abolitionist, entrepreneur, legal theorist, and political radical. Spooner summarized the case for jury discretion as follows:

> The object of this trial "by the country," or by the people, in preference to a trial by the government, is to guard against every species of oppression by the government. In order to effect this end, it is indispensable that the people, or "the country," judge and determine their own liberties against the government instead of the government's judging of and determining its own powers over the people. How is it possible that juries can do anything to protect the liberties of the people against the government, if they are not allowed to determine what those liberties are? Any government, that is its own judge of, and determines authoritatively for the people, what are its own powers over the people, is an absolute government of course. It has all the powers that it chooses to exercise.[25]

Spooner cogently counters the main philosophical objection to jury discretion: that juries do not have the right to ignore or nullify laws enacted by democratically elected authorities. To Spooner, the jury is merely one of five "tribunals" created by the Constitution. In order for a citizen to be deprived of liberty, all five tribunals—the House of Representatives, the Senate, the executive, judiciary, and the jury—must agree. All five entities "represent the people"; thus, it is absurd to say that juries which exercise legal discretion are not "representing the people."[26] Judges may be selected *demo*cratically, but jurors are the *demos*.

Spooner saw "criminal intent" as the hallmark of crime, believing that no one can have criminal intent to commit an act which is "intrinsically innocent, though forbidden by the government." That is, Spooner, like Jefferson, Locke, "Cato," and the majority of the

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[25]Lysander Spooner, *An Essay on Trial by Jury* (Boston: John P. Jewett, 1852), p. 6.

[26]Spooner, *An Essay on Trial by Jury*, pp. 11–12.

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founders, believed in natural law, which prohibits only intrinsically evil acts, such as murder, assault, and robbery. In Spooner's words, "The safety of society, which is the only object of the criminal law, requires only that those acts which are understood by mankind at large to be intrinsically criminal, should be punished as crimes."[27] According to Spooner, a state which can criminalize virtually any behavior is a tyranny, and juries may rightfully acquit persons who are charged with such offenses:

> [N]o man can be convicted unless the jury find, not only that the statute is law—that it does not infringe the rights and liberties of the people—but also that it was so clearly law, so clearly consistent with the rights and liberties of the people, as that the individual himself, who transgressed it, knew to be so, and therefore had no moral excuse for transgressing it.[28]

Spooner saw jury nullification of majoritarian laws not as a flaw of nullification but as its main purpose, as "the crowning merit of the trial by jury."[29] It is best to let Spooner, not one to mince words, speak for himself:

> It is this power of vetoing all partial and oppressive legislation, and of restricting the government to the maintenance of such laws as the whole, or substantially the whole, people are agreed in, that makes the trial by jury "the palladium of liberty." Without this power it would never have deserved that name. *The will, or the pretended will, of the majority, is the last lurking place of tyranny of the present day.* The dogma, that certain individuals and families have a divine appointment to govern the rest of mankind, is fast giving place to the one that the larger number have a right to govern the smaller; a dogma which may, or may not, be less oppressive in its practical operation, but which certainly is no less false or tyrannical in principle, than the one it is so rapidly supplanting. Obviously there is nothing in the nature of majorities, that insures justice at their hands. . . . The relative numbers of the opposing parties have nothing to do with

[27]Spooner, *An Essay on Trial by Jury*, p. 186.

[28]Spooner, *An Essay on Trial by Jury*, p. 181. Spooner also wrote an essay called *Vices are Not Crimes*, so it is fair to say that gambling, to Spooner, is an example of the type of criminal statute that a jury could well nullify. Since state governments and the church both operate gambling enterprises, it is difficult to argue that gambling is intrinsically evil.

[29]Spooner, *An Essay on Trial by Jury*, p. 206.

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> the question of right. And no more tyrannical principle was ever avowed, than that the will of the majority ought to have the force of law, without regard to its justice; or, what is the same thing, that the will of the majority ought always to be presumed to be in accordance with justice. *Such a doctrine is only another form of the doctrine that might makes right.*[30]

THE COUNTER-REVOLUTION

Spooner's case for jury nullification rested ultimately on the distinction between republican and democratic government. (These terms should not be confused with the "Democratic" and "Republican" political parties, neither of which is republican and both of which are democratic.) Republican government, which is what the founders thought they were creating, is small and limited to a short list of functions derived from the individual's natural right of self-defense, such as courts, police, and national defense. In a republican government, officials are elected by majorities, but the principle of majority rule does not sanction the violation of individual rights or the expansion of government powers beyond those defined by republican theory. Starting with an essentially minimal state *republic*, we have, in 225 years, metamorphosed into a *democracy*, a very different form of government. The predominant belief today, whether of citizens or legislators, judges or law professors, is that, with few exceptions, what the majority says goes. If officials elected by the majority want to ban guns, tell farmers how much wheat they can grow each year, or regulate the color people can paint their houses, they should be free to do so.

In a true republic, such as that the founders attempted to create, jury nullification would be welcome and considered necessary, as it was for a time. In a democracy, it cannot be tolerated. Thus, the New York Court of Appeals in 1863 and the U.S. Supreme Court in 1895 rejected the doctrine. Given the radical implications of Spooner's view of the constitutional right to trial by jury, it is no surprise that judges, part of the very government whose powers would be reined in by that doctrine, rejected it.

In the early years of New York state,

> the doctrine that in criminal cases the jury had the right as well as the power to determine both the law and the

[30]Spooner, *An Essay on Trial by Jury*, pp. 206–7, emphasis added.

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> facts, if not universally accepted, prevailed to a very great extent. That seems to have been the view of Chancellor Kent. (See *People v Croswell,* 3 Johnson's Cases, 336).[31]

However, the New York Court of Appeals ruled in 1863 that juries must be "governed by the instructions of the court upon legal questions as it is in civil cases."[32] The court did not discuss the New York Constitution, its guarantee of trial by jury, or what that guarantee meant at the time it was ratified. The court did note that juries "have the power to do otherwise, but the exercise of such power cannot be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions whether of fact or law, or of ascertaining upon which their verdicts are based."[33]

The Supreme Court was finally heard on the present controversy in 1895. In *Sparf v United States*, a divided court in a 132-page opinion held that juries do not have the right to determine the law. The issue in the case was whether the jury could find the defendant guilty of the lesser included offense of manslaughter even though the trial judge saw no evidence to support that charge.

It will be instructive to first discuss the dissent, written by Justice Gray and joined by Justice Shiras. Gray had a reputation for detailed historical analysis and used this skill to great effect in his lengthy dissent. The most significant fact about Justice Gray's opinion is that he squarely frames the issue as whether "the case, involving the question of life or death to the prisoners, was . . . submitted to the decision of the jury as required by the Constitution and laws of the United States."

Gray discussed *Bushell's Case* exhaustively. In that case, the essence of Chief Justice Vaughan's argument was that since, in a criminal case, the jury issues a *general verdict* of guilty or not guilty, "they resolve both law and fact complicately, and not the fact by itself; so as though they answer not singly to the question what is the law, *yet they determine the law in all matters*." Justice Gray explained Justice Vaughan's reasoning as follows:

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[31]*People v Sherlock,* 166 NY 180, 184 (1901). Citation to *Croswell* is included in the original.

[32]*Duffy v The People,* 26 NY 588, 591; see also *People v Tirado,* 192 AD2d 755 (3rd Dept. 1993).

[33]*Duffy v The People* at 593.

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> If the jury, especially in criminal trials, were obliged to follow the directions of the court in matter of law, no necessary or convenient use could be found of juries or to continue trials by them at all; that though the verdict of the jury be right according to the law as laid down by the court, yet, [they must be] assured by their own understanding that it is so. . . . [U]pon general issues of fact, involving matter of law, the jury resolve both law and fact complicately, *and so determine the law.*[34]

Justice Gray quoted with approval Lord Camden, debating in the House of Lords in 1792:

> If the opposite doctrine were to obtain, trial by jury would be a nominal trial, a mere form; for in fact, the judge, and not the jury would try the man. . . . It was [the judge's] undoubted duty [to state the law]; but, having done so, the jury were to take both law and fact into their consideration, and to exercise their discretion and discharge their consciences.

Justice Gray proceeded to discuss American authorities, noting that American views were more in accord with Lords Camden and Vaughan than with their British opponents on the issue. Justice Gray noted that Messrs. Adams, Parsons, Hamilton, and Kent—previously cited in this article—all believed that juries judge the law and the fact. After discussing the predominant view of state court cases in favor of jury discretion, Gray summarized his findings, which are worth quoting at length:

> Until nearly 40 years after the adoption of the Constitution of the United States, not a single decision of the highest court of any state, or of any judge of a court of the United States, has been found, denying the right of the jury upon the general issue in a criminal case to decide, according to their own judgment and consciences, the law involved in that issue, except the two or three cases, above mentioned, concerning the constitutionality of a statute. And it cannot have escaped attention that many of the utterances above quoted, maintaining the right of the jury, were by some of the most eminent and steadfast supporters of the Constitution of the United States, and of the authority of the national judiciary.
>
> [U]pon the question of the true meaning and effect of the Constitution of the United States in this respect,

[34]Emphasis added.

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opinions expressed more than a generation after the adoption of the Constitution have far less weight than the almost unanimous voice of earlier and nearly contemporaneous judicial declarations and practical usage.

The principal grounds which have been assigned for denying the right of a jury, upon the general issue in a criminal case, to determine the law against the instructions of the court, have been that . . . judges are more competent than juries to determine questions of law; and that decisions upon such questions in one case become precedents to guide the decision of subsequent cases. *But the question, what are the rights, in this respect, of persons accused of crime, and of juries summoned and impaneled to try them, under the Constitution of the United States, is not a question to be decided according to what the court may think would be the wisest and best system to be established by the people or by the legislature; but what, in the light of previous law, and of contemporaneous or early construction of the Constitution, the people did affirm and establish by that instrument.*

The duty of the jury, indeed, like any other duty imposed upon any officer or private person by the law of his country, must be governed by the law, and not by willfulness or caprice. The jury must ascertain the law as well as they can. Usually they will, and safely may, take it from the instructions of the court. But, if they are satisfied on their consciences that the law is other than as laid down to them by the court, it is their right and their duty to decide by the law as they know or believe it to be.

The rules and principles of the criminal law are, for the most part, elementary and simple, and easily understood by jurors taken from the body of the people. . . . On the other hand, it is a matter of common observation that judges and lawyers, even the most upright, able, and learned, are sometimes too much influenced by technical rules; and that those judges who are wholly or chiefly occupied in the administration of criminal justice are apt, not only to grow severe in their sentences, but to decide questions of law too unfavorably to the accused.

The purpose of establishing trial by jury was not to obtain general rules of law for future use, but to secure impartial justice between the government and the accused in each case as it arose.

There may be less danger of prejudice or oppression from judges appointed by the president elected by the

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> people than from judges appointed by a hereditary monarch. But, as the experience of history shows, it cannot be assumed that judges will always be just and impartial, and free from the inclination, to which even the most upright and learned magistrates have been known to yield, —from the most patriotic motives, and with the most honest intent to promote symmetry and accuracy in the law,—of amplifying their own jurisdiction and powers at the expense of those intrusted by the constitution to other bodies. And there is surely no reason why the chief security of the liberty of the citizen—the judgment of his peers—should be held less sacred in a *republic* than in a monarchy.[35]

The most significant fact about Judge Harlan's majority opinion is what it does not discuss. It is completely silent about the constitutional right to trial by jury, expressed in Article 3 and the Sixth Amendment. It proceeds as if the issue were a matter of judicial policy only. Justice Harlan, apparently oblivious to the constitutional issues involved, does not mention the views of founders John Adams, Theophilus Parsons, and Alexander Hamilton. In discussing the opinion of Chief Judge John Jay, Justice Harlan concludes that Justice Jay's remarks must have been misreported, although he offers no evidence to support the conclusion.

The opinion next discusses the views of Chief Justice John Marshall. It should be noted, however, that Marshall was not a founder or framer, and, thus, his authority as to the meaning of the Constitution when ratified does not resemble that of Messrs. Adams, Jefferson, Hamilton, or Jay. Nevertheless, Marshall's comments, made while presiding at the treason trial of Aaron Burr, though viewed favorably by Justice Harlan, are not of much comfort to today's anti-nullifiers:

> Levying of war is a fact which must be decided by the jury. The court may give general instructions on this as on every other question brought before them, but the jury must decide upon it as *compounded of fact and law*. . . . The jury have now heard the *opinion* of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty *as their own consciences may direct.*[36]

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[35]All emphases have been added.

[36]Quoted in *Sparf v United States*, 156 US 51, 61.

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The above passage places Marshall roughly in the middle of the controversy. By conceding that juries decided questions "compounded of fact and law," he supports the nullifiers' view that general verdicts necessarily imply some degree of judgment as to the law. The last clause—"as their consciences may direct"—would be unacceptable in today's courts. Jurors are now instructed that they "must" convict if the evidence is there.[37] Juries today are not supposed to exercise their collective conscience, only their information-processing abilities as fact-finders.

Harlan next relies on the remarks of Justice Samuel Chase in the Case of Fries. Justice Chase, however, does not discuss the meaning of the Constitution, but rather, makes a policy argument against giving juries discretion over the law. Essentially, Chase speculates that juries will abuse the right and destroy the uniformity of the law. The implied premise of his argument is that jurors, the people, are stupid and irresponsible. If that is the case, one wonders why they should be deciding issues of fact either. In fact, the premise is thoroughly consistent with the utter elimination of self-government, and its replacement by the rule of self-appointed dictators. Chase also makes a hidden assumption, challenged by Justice Gray, that judges will at all times act flawlessly in dictating the law to juries.

The only reference in the entire majority opinion to the circumstances leading to the Revolution and the ratification of the Constitution is as follows:

> The language of some judges and statesmen in the early history of the country, implying that the jury were entitled to disregard the law as expounded by the court, is perhaps to be explained by the fact that "in many of the states the arbitrary temper of the colonial judges, holding office directly from the crown, had made the independence of the jury, in law as well as in fact, of much popular importance."[38]

Here, Justice Harlan arbitrarily disregards the views of those most intimately involved in drafting the Constitution, and erroneously concludes that the founders' distrust of government extended

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[37]In *People v Goetz,* 73 NY2d 751 (1988), the New York Court of Appeals, in a half-page opinion, approved of an instruction to the jury that they "must" find the defendant guilty if they find there is evidence establishing the elements of the offense beyond a reasonable doubt.

[38]Case of Fries, Fed. Cas. No. 5, 126 (1800).

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only to colonial rule. The Constitution and Bill of Rights argue to the contrary.

Though *Sparf v United States* is the leading case cited by modern opponents of jury nullification, the actual trial instructions in that case—never repudiated by Justice Harlan—would horrify such opponents. The trial court instructed the jury that the defendants would be executed if found guilty of murder. The trial court instructed the jury that it had the "power" to find the defendants guilty of manslaughter, but only against the instruction of the court. The trial court even stated a proposition which lies at the heart of nullification doctrine: "I cannot direct you what *conclusion* to come to from the facts."[39] This statement essentially means that the jury must reach a general verdict, combining both facts and law.

Modern federal cases do not emphasize the particular facts of *Sparf v United States* but only apply its general principles to a variety of issues concerning the rights and powers of juries. In *United States v Anthony Edwards*, the Second Circuit Court of Appeals held that the trial court did not err in denying the following request to charge:

> if collectively you decide that despite the acts of the [defendant] which you may find the government proved beyond a reasonable doubt, you believe that the actions should not be considered to be criminal by society, you may find him not guilty.

Instead, the court approved the charge actually given:

> There was talk here of motive by the defendant. The motive that defendant had or claimed to have had for committing a crime charged is irrelevant to his guilt or non-guilt. Whether this defendant committed acts in order to further a political goal or for a similar reason, for his personal gain or for the gain of somebody else, doesn't excuse his acts if he committed them and violated the law.[40]

The court noted that the trial judge's instructions did not "suggest that the jury could not nullify the law but quite properly implies only that it should not."[41] The court stated that "[w]hile juries have the

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[39]Emphasis added.

[40]*United States v Anthony Edwards*, 101 F3d 17 (2d Cir 1996).

[41]See *United States v Sepulveda*, 15 F3d 1161, 1190 (1st Cir 1993).

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power to ignore the law in their verdicts, courts have no obligation to tell them they may do so. It appears that every United States Circuit Court that has considered this issue agrees."[42]

CRACKING DOWN

Not only may today's juries not "lawfully" nullify the law, but lawyers who argue defenses interpreted by the court as appeals to nullification risk imprisonment. In *Zal v Steppe*, the court refused to grant *habeas corpus* relief to an attorney who had argued various defenses, on behalf of an anti-abortion protester, which had been excluded by the trial judge. The concurring opinion described introduction of evidence explaining the defendant's actions—ruled irrelevant by the trial court—as a "fundamentally lawless act."[43]

Even a jury's "power" to nullify the law is eroding. Since jurors are usually sworn when they are questioned in *voir dire*, and are now being questioned about their views on nullification, this raises the prospect of prosecutions for perjury, criminal contempt, or perhaps obstruction of justice if a juror falsely testifies, or even fails to speak in response to a question to the panel. In 1997, Laura Kriho, a juror in Colorado who was sympathetic to nullification, was convicted of criminal contempt, in part because she failed to disclose her pro-nullification views in *voir dire*.

In *United States v Thomas,* 116 F3d 606 (2nd Cir 1997), the court held that a juror who intends to nullify the applicable law is subject to dismissal. Moreover, a trial court may investigate whether such conduct occurred during jury deliberations by interrogating the jury. Since it has been held proper to inquire of jurors on *voir dire* whether

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[42]The court cited the following cases in support of its holding: *United States v Sepulveda,* 15 F3d 1161, 1190 (1st Cir 1993) at 1189–90; *United States v Moylan*, 417 F2d 1002, 1006–7 (4th Cir 1969); *United States v Krzyske*, 836 F2d 1013 (6th Cir 1988); *United States v Perez*, 86 F3d 735 (7th Cir 1996); *United States v Drefke*, 707 F2d 978, 982 (8th Cir 1983); *United States v Powell*, 955 F2d 1206, 1213 (9th Cir 1992); *United States v Mason,* 85 F3d 471, 473 (10th Cir 1996); *United States v Trujillo*, 714 F2d 102, 105–6 (11th Cir 1983); *United States v Dougherty*, 473 F2d 1113, 1130–37 (DC 1972); see also *Skidmore v Baltimore & O.R. Co.*, 167 F2d 54, 57 and n.13 (2d Cir 1948); *United States v Desmond*, 670 F2d 414, 417 (3d Cir 1982); and *Washington v Watkins*, 655 F2d 1346, 1374 n.54 (5th Cir 1981).

[43]*Zal v Steppe,* 968 F2d 924 (9th Cir 1992).

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they intend to nullify the applicable law, if such investigation reveals that a juror who denied such intent in *voir dire* subsequently urged fellow jurors to nullify, then that juror is subject to being prosecuted for perjury or perhaps obstruction of justice.

Not only are judges taking steps inside the courtroom to combat jury nullification, but prosecutors are extending the war against nullification outside the courtroom. In 1997, the Supreme Court of Alaska held that a citizen who distributed pro-nullification literature to trial jurors inside a courthouse could be charged with jury tampering and criminal trespass.[44] California courts now advise jurors that they must advise the court if another juror expresses an intention to disregard the law in reaching a verdict.[45] They are also authorized to dismiss jurors who, during deliberations, insist on deciding cases based on their conscience.[46] So much for John Marshall's charge in Aaron Burr's case.

It is apparent that courts are no longer prepared to accept nullification as an inevitable fact about the jury system or even praise it as a way for the justice system to deal with hard cases. Rather, courts and prosecutors are aggressively combating nullification, even at the cost of the ancient and venerable tradition of the secrecy of jury deliberations.

A Republican Critique

In *People v Douglas*, Justice Dominic R. Massaro, a sympathetic opponent of jury nullification, mirrored the analysis stated above in explaining the decline of the doctrine:

> [T]he right of the jury independently to decide questions of law was widely recognized until well into the nineteenth century. Not only did juries have the right to judge the law, "counsel had the right to argue the law—its interpretation and its validity—to the jury." (Note, "Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy," 85 *Geo. L. J.* 191, 198 [1996]). . . . As time passed, the idea that juries were competent to interpret the laws began to recede, reflecting the sentiments of an established nation rather than the spirit of a *revolutionary* one. This inaugurated a progressive constitutional revolution

[44] *Turney v State,* 936 P 2d 533.

[45] *People v Engelman,* Cal Ct App (Feb. 1, 2000).

[46] *People v Odam,* Cal Ct App (Feb. 10, 1999).

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> that has changed the entire landscape of American law and life, elevating the moral fundamentality of the *democratic* order. . . . And while, as a practical matter, juries have, and continue to exercise the power to engage in nullification, its exercise implicates a fundamental conflict between the rule of law and the jury's historic role as a restraint on the arbitrary power to oppress. Indeed, the democratic purposes initially served by such juries have since come to be better served by other democratic institutions.[47]

If we read "revolutionary" to mean "republican"—for republicanism was and still is revolutionary—there is little disagreement between this author and Justice Massaro about the passing of nullification from the scene. Nullification was a proper policy for juries when we had a republic. To pave the way for the democracy we now have, nullification had to be vanquished. This was accomplished not by proper constitutional amendment, but by a judicial counter-"revolution."

Recently, a judge in Illinois called nullification "vacuous and intellectually bankrupt," and "pernicious."[48] This charge, leveled against a doctrine accepted by the two greatest legal minds of the revolutionary period—Thomas Jefferson and Alexander Hamilton—shows how far we have strayed from our republican roots. Judge Steigman, clearly no republican, complained that jurors are "unelected and unaccountable to a constituency." Though jurors are not elected, they are the people who do the electing. They are therefore the *electorate;* they are the *constituents.* Judge Steigman's comments inadvertently reveal the elitism that lies at the core of anti-nullification sentiment, an elitism alluded to by Justice Gray in *Sparf v United States*.

The rule against discussing penalties before the jury is another example of judicial elitism. Criminal trial lawyers have heard this instruction given so many times that they hardly give it a passing thought. Upon reflection, however, the principle seems absurd. The jury is not allowed to consider the consequence of its actions, even though when responsible people make serious decisions in everyday life, they invariably consider the consequences. Democratically

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[47]*People v Douglas,* 178 Misc. 2d 918 (Sup Ct Bronx Co.), emphasis added, citation included in original.

[48]*People v Smith,* Illinois Appellate Ct, No. 4-97-0079 (May 4, 1998), Judge Steigman, concurring.

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chosen judges refuse to tell the jury, *the people*, what is a matter of public record, the sentences that legislators chosen by the people have in store for those the people find guilty of crimes. The hidden assumption is that the people are largely ignorant of what their legislators are doing, and that, if they ever found out, they would recoil in horror and acquit otherwise guilty persons. This jury charge is a Freudian slip, an inadvertent confession by judges of a lack of trust in those who hired them.

Jurors, though not entirely free of general biases and prejudice, are generally free of axes to grind and oxen to gore with respect to the *specific* parties, lawyers, and issues before the court. Jurors have personal biases and prejudices, but so do judges. Judges, however, unlike jurors, frequently *do* have biases about the specific parties, lawyers, and issues before them. Further, judicial bias is not ameliorated by the presence of eleven other, quite different people. Thus, both judges and juries are biased; however, the institution of the jury makes juries *less likely* than judges to let personal bias taint their decisions.

Judge Steigman's comments also inadvertently reveal one of the highest virtues of jurors as compared to government officials. Jurors did not seek the job; judges, prosecutors, and legislators did. They sought their positions of power by seeking the support of the various parties, factions, and special interests which exercise influence over the political process. Once in office, those officials are, therefore, naturally inclined to favor certain points of view, ideologies, factions, and special constituencies. Thus, while judges, for example, have a superior knowledge of the law, that knowledge, in and of itself, does *not* guarantee that they will *not* issue legal instructions at trial, or ratify the same on appeal, which reflect their own personal, political, or philosophical biases or hidden agendas.

If I were a judge, my republican political and philosophical views would have an impact on my legal rulings. I also know that no one who held firm to Jeffersonian republican views could presently be elected to public office in Buffalo, New York. But does it not also follow that judges who hold contrary views—views approved of by the majority of the minority of citizens who actively participate in the political process—are going to issue legal rulings and instructions that reflect those views and philosophies? It follows, then, that modern judges generally hold views favorable to majoritarian democracy, hostile to classic small-government republicanism, and

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favorable to the type of gradual expansion of government power that they have ratified for the last one hundred years. Thus, judges largely responsive to majoritarian concerns have been gradually whittling away the rights of juries, whose anti-democratic unanimity principle is the ultimate guardian of minority and individual rights.

Though judges cringe at the prospect of jury nullification, they themselves exercise the power of judicial nullification. Nearly every federal and state judge who has considered the matter has ruled, contrary to the words of the Second Amendment and its commonly understood meaning when it was ratified, that it does not guarantee a personal right to bear arms.[49] Such a judiciary cannot be trusted to properly advise jurors of the law when, in Jefferson's words, "the question relate[s] to any point of public liberty." Judge Steigman argued that judges are responsible to "reviewing courts," but did not say to whom the reviewing courts are responsible. Since no appellate judge in memory has been removed from office for misinterpreting the Constitution, we can conclude that such judges are ultimately responsible to no one. That is why they can issue rulings which say:

- The right of the people to bear arms means the people do not have the right to bear arms.[50]
- Probable cause does not mean probable cause.[51]
- The Tenth Amendment is a "truism," empty of meaning.[52]
- Americans of Japanese descent may be held in concentration camps.[53]
- "[T]he enforced separation of the races . . . neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment."[54]

Thus, anti-nullifiers who argue that there would be no way to stop juries from abusing their right to decide the law have proven

[49]E.g., *Hickman v Block,* 81 F3d 98 (9th Cir 1996).

[50]*Hickman v Block.*

[51]*Illinois v Gates*, 462 US 213, 238 (1983).

[52]*United States v Darby,* 312 US 100, 124 (1940).

[53]*Korematsu v United States*, 323 US 214 (1944).

[54]*Plessy v Ferguson,* 163 US 537 (1896).

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far too much. There is already no way to stop *judges* from doing likewise. Worse yet, juries decide only the cases before them, while judges' errors become precedent for numerous other cases.

The founders were extraordinarily well-schooled in history and political philosophy. Jefferson, for example, read the classics—Homer, Plato, Cicero, and Virgil—in the original Greek and Latin.[55] Jefferson and his colleagues understood what we, even after witnessing the slaughterhouse of the twentieth century, have yet to learn: that history shows that government officials abuse their power for their own interests and that, to avoid the endless tyrannies of the past, they had to construct a political system which *diffused power*—not only among branches and levels of government, but between the government and the people. The right of juries to decide the law and the right to bear arms were manifestations of this insight. Both rights are being eviscerated, however, since the framers left the "judicial power" solely in the hands of the government. The republican founders' ingenious diffusal of power has been defused.

THE FINAL BLOW?

Jury nullification, once a right, then a power, then a secret power, now a "lawless act," has become a "pernicious" vestige of colonial times and revolutionary republicanism. Modern doctrine holds that nullification is a wrong to be combated by all lawful means. If it yet exists, it is only the result of "the requirement for a general verdict in criminal cases."[56] But such an assertion merely begs the question. If nullification is "vacuous" and "pernicious," and is based on the so-called "requirement" of a general verdict, why not eliminate the general verdict? Here we meet the inner contradiction of anti-nullification thought.

Though nullification is the natural and inescapable result of our use of general verdicts, anti-nullifiers aim all their vituperation at nullification, and none at general verdicts. In doing so, they aim at the wrong target. If we take them at their word that the court is the sole judge of the law, it logically follows that jurors should make no legal determinations such as those implied in today's general verdicts, which require judgments that take both law and fact into account.

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[55]Willard Sterne Randall, *Thomas Jefferson: A Life* (New York: HarperCollins 1994), pp. 3, 16, and 26.

[56]*United States v Moylan,* 417 F2d 1002, 1006 (4th Cir 1969).

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Instead, judges should give the jury a special verdict sheet with as many detailed interrogatories as are needed to determine the factual issues in the case. Upon receipt of the special verdict, judges can then make the *legal* judgment of guilty or not guilty.

The general verdict is a vestigial remnant from the past, when jurors were given the right to judge the whole case, including fact and law. It once had the function of allowing juries to check the power of oppressive governments. Since those powers and rights have been stripped away, the useless and dying organ need only be excised by appropriate legislation, and ratified by the same judges who have condemned nullification.

Summary and Conclusion

Jury nullification has gone through the following transformations over the last several hundred years:

- A practice which subjects jurors to punishment by the court—England, circa 1500.
- A right which may not be punished—England, circa 1670.
- A power subject to no judicial review—U.S., 1895.
- A power about which the court and the lawyers may not inform jurors—U.S., circa, 1980.
- A practice which subjects jurors to punishment by the court—U.S., 2000.

Modern, sophisticated legal analysis has succeeded in taking our jury system back to medieval England.

Modern judges commonly say that juries have the power but not the right to nullify the law. However, an understanding of the history and purposes of the right to trial by jury lead one to the inescapable conclusion that judges have the power but not the right to nullify jury nullification.

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